MINUTES

MONTANA SENATE
59th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN MIKE WHEAT,** on March 14, 2005 at 8:00 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: HB 201, HB 49, HB 191, HB 696
Executive Action: HB 97; HB 98; HB 285; HB 345; HB 349; HB 363; HB 367

CHAIRMAN WHEAT introduced the bills in order of hearings; HB 201, HB 49, HB 191, and then HB 696. He opened the hearing on HB 201.

HEARING ON HB 201

Opening Statement by Sponsor:

REP. RICK RIPLEY (R), HD 17, opened the hearing on **HB 201**, Fund natural resource damage litigation.

REP. RIPLEY brought the bill at the request of the Department of Justice. The bill would extend authorization for the Department of Justice to continue using the $650,000 line of credit, authorized by the 2003 legislature. He reported that less than $200,000 of the loan had been spent as of January 1. He informed the Committee that the bill required a three quarters vote of each house of the legislature because the loan was from the Coal Tax Severance Permanent Fund.

{Tape: 1; Side: A; Approx. Time Counter: 0 - 1.5}

Proponents' Testimony:

Chris Tweeten, Chief Civil Counsel, Office of the Attorney General, informed the Committee that HB 201 was the bill to continue the funding for the State's litigation and restoration efforts with respect to the cleanup of the Clark Fork River Basin from Butte to Milltown. He passed out a fact sheet from the Department of Justice and written testimony from the Confederate Salish and Kootenai Tribes in support of the bill.

EXHIBIT(jus56b01)
EXHIBIT(jus56b02)

Mr. Tweeten explained that the bill would continue the funding of the efforts to complete the Natural Resources Damage litigation with respect to the cleanup of more than a centuries mining pollution in the upper Clark Fork River Basin. The lawsuit was started in the 1980's under the Superfund Law. He informed the Committee that the lawsuit was originally litigated by outside counsel. However, Governor Stevens had decided that it would be more cost effective to litigate the case through an in-house program so he created the Natural Resource Damage Litigation Program. He noted that the litigation had been funded by loans from a couple of different sources, first by a general fund loan and then through the coal severance tax trust fund. He stressed that it was a loan which was reinstated every session. He indicated that the line of credit was set up through an agreement between the Department of Justice and the Board of Investments

which would allow the program to draw against the authorized loan amount as it needs the money. He remarked that last session the legislature had authorized $650,000 as the sum for the line of credit. He indicated that $200,000 of that is estimated to be expended. He reported that HB 201 would extend the authority to borrow against the $650,000 through the 2007 biennium.

Mr. Tweeten expressed that the program had divided itself into two different functions, one of which, the restoration portion, is funded principally through the expenditure of monies recovered in the settlement that was made with ARCO for a portion of the State's claim. The $650,000 was authorized for the operation of the litigation side of the program. He noted that there were three separate claims held by the State of Montana against Arco, that have not been settled or litigated to a judgment. These are the claims for the restoration of the Clark Fork River between Anaconda and Milltown, the groundwater aquifer underlying the city of Butte, and for cleanup of the uplands area around the Anaconda smelter. He reiterated that the bill would permit the withdrawal of funds from the Coal Severance Tax Trust Fund and thus would need a three-fourths vote of the Senate in order to be approved. He pointed out that while the litigation has been going on for a significant period of time, there has been a remarkable recovery for the State of Montana.

{Tape: 1; Side: A; Approx. Time Counter: 1.5 - 9.8}

Sandy Olson, Remediation Division, Department of Environmental Quality, spoke in support of HB 201. She remarked that the funds that have been obtained through the Natural Resource Damage settlements in the Clark Fork River Basin will allow the state to substantially enhance the remedies being done between Butte and Milltown. She noted that the state has substantial investment in the claims that are still to be resolved and she felt that it was important to see them through to completion.

{Tape: 1; Side: A; Approx. Time Counter: 9.8 - 10.8}

Larry Peterman, Chief of Field Operations for Fish, Wildlife, and Parks, stated that Montana, through the Natural Resources Damages Program, has worked to see that Montana citizens receive fair compensation for the natural resources that have been damaged by the release of hazardous substances that have been released in the upper Clark Fork River Basin. He attested that the Department of Fish, Wildlife, and Parks has worked closely with the lawsuits because of the impact on fish, wildlife, and their habitats. He provided a written form of his testimony.

EXHIBIT(jus56b03)

{Tape: 1; Side: A; Approx. Time Counter: 10.8 - 13.2}

John Wilson, Representing Montana Trout Unlimited, remarked that the restoration has been very successful and appears to be coming to an end as far as litigation is concerned. He expressed that the rehabilitation will bring hundreds of jobs to the area and will result in a clean healthy river.

{Tape: 1; Side: A; Approx. Time Counter: 13.2 - 14.9}

Jeff Barber, Representing Montana Environmental Information Center, spoke in support of the bill.

{Tape: 1; Side: A; Approx. Time Counter: 14.9 - 15.2}

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. AUBYN CURTISS, SD 1, FORTINE, wondered why the litigation expenses couldn't be used from the previous settlement.

Mr. Tweeten replied that the settlement funds, recovered under the federal Superfund Law, are restricted by federal law to expenditure for restoration purposes. He indicated that the settlement fund is funding the restoration side of the Natural Resource Damage Program. He reported that there were grants given by the governor on an annual basis that would go toward restoration projects, but once again they cannot be used for the litigation side of the program.

SEN. CURTISS remembered that when the New World Mine settlement was made, the State of Montana was recompensed with land for some of the damages. She wanted to know if there would be such a proposal extended to settle a portion of the on-going claims.

Mr. Tweeten responded that it was hard to predict what the components of the settlements might be for the various claims. He noted that ARCO did own some property in the basin and there has been some limited land expansion as part of the restoration. However, the claims are primarily for financial damages for past injury to the resources. He thought that it might be possible to have some land exchange but he did not think that ARCO owned a significant amount of land in the basin to make a land exchange a major component.

SEN. CURTISS asked if it would be possible to get a list of the ways in which the $113 million has been allocated.

Mr. Tweeten remarked that they could give her a list of the grants that have been previously allocated.

{Tape: 1; Side: A; Approx. Time Counter: 15.2 - 19.2}

SEN. DANIEL MCGEE, SD 29, LAUREL, wanted to know why the $650,000 that was part of the last appropriation was not spent.

Mr. Tweeten answered that it was an expenditure to fund litigation and the prediction two years earlier had been a speculative proposition. They had asked for authorization to borrow an amount of money they knew would be sufficient to address whatever contingency they could foresee at that time. It turned out that they had only had to spend $200,000. He expressed that it was difficult to predict the amount in advance.

SEN. MCGEE followed up, asking if they were still talking about a settlement approaching $500-$700 million.

Mr. Tweeten replied that he did not know what the total amount of the settlement would be. He thought that $180 million was the value of the claims they were asking for currently.

SEN. MCGEE remembered that in 1995 they had been talking about $700-$750 million. He wanted to know if that number had changed.

Mr. Tweeten expressed that it had changed in the course of settling the partial claim for Silverbow Creek. He noted that there were certain compromises that had to be made. He indicated that the numbers projected were predictions and not promises. He asserted that in order to go into negotiations they had needed to know what their claim was worth, and that was the number they had settled on. He projected that there was around $180 million of claims left to settle.

{Tape: 1; Side: A; Approx. Time Counter: 19.2 - 22.1}

SEN. MCGEE asserted that $750 million was the number that they had been discussing.

Mr. Tweeten did not dispute that the number was mentioned.

SEN. MCGEE asked what the plan was if HB 201 did not pass.

Mr. Tweeten responded that if the bill was not passed there would be no funding for the operation of the program. He mentioned

that the agreement that the Department of Justice made with the Governor's Office was that the Department would operate the program but would not fund the program with ongoing appropriations used to support other Department of Justice Programs. He stressed that without the funding the program would cease to exist. He admitted that they had not fully planned for what to do with the claim if the program did not exist. However, he noted that their ability to prosecute the claim would be impaired without funding.

SEN. MCGEE wanted to know how long it would take to finish.

Mr. Tweeten replied that it would depend on the course of the litigation. He noted that part would depend on the rate at which the Environmental Protection Agency and the Department of Environmental Quality complete work on the records of decision. He mentioned that other things would come up as well that could slow down the process. He felt that there would be significant process made in the coming biennium.

SEN. MCGEE stated that they had been working at this project for 25 years.

Mr. Tweeten corrected him, saying that it has been 22 years.

{Tape: 1; Side: A; Approx. Time Counter: 22.1 - 24.9}

CHAIRMAN WHEAT asked **REP. RIPLEY** to tell them what the vote had been on the House side, concerning this bill.

Closing by Sponsor:

REP. RIPLEY thought that the vote was around 70-30 in the House. He was in favor of developing natural resources in a careful, prudent, and environmentally sound manner. He agreed to pass the bill because he supports the development of natural resources in an environmentally sound manner, if it is not done in a careful and prudent manner then those who are doing the development should be held accountable, and because it was not asking for new money, but extending the present line of credit. He felt that if it could help bring closure to the lawsuit without increasing funds he would support it.

{Tape: 1; Side: A; Approx. Time Counter: 24.9 - 27.3}

CHAIRMAN WHEAT closed the hearing on HB 201 and opened the hearing on HB 49.

HEARING ON HB 49

Opening Statement by Sponsor:

REP. BILL WILSON (D), HD 22, opened the hearing on **HB 49,** Revise registration requirements for sexual and violent offenders.

REP. WILSON brought the bill at the request of the Department of Justice to deal with issues that have come up in relation to the enforcement of the sex offender and violent offender registration laws. He went through the bill, touching on the main points. He informed the Committee that Section 1 of the bill would allow Montanans to require registration of a sex offender whether Montana has the same law on the books. He noted that Section 2 made registration procedures more workable. He explained that the burden would still be on the offender to register. In Section 3, change of address requirements were clarified while Section 4 dealt with violent offender registration. He commented that Section 4 would say that the violent offender would have to petition the court to be relieved of registration. This would allow the individual to be scrutinized more closely before their release from registration. The final thing he addressed was the new language in Section 6 which would allow Montana to recognize risk levels given to offenders in other states. He added that he was in agreement with the proposed amendment by Brenda Thompson.

{Tape: 1; Side: B; Approx. Time Counter: 0 - 4.2}

Proponents' Testimony:

Ali Bovington, Representing the Attorney General's Office, stated that Montana's Sexual and Violent Sexual Offender Registration Act was designed to protect the public from individuals who have been convicted of sexual or violent offenses in Montana. She noted that the offenders were required to register with their local law enforcement agencies or with the Department of Corrections. She claimed that HB 49 would revise the act to clarify administrative issues that have arisen over the course of administering the act. The changes seek to change the act to better serve the public. She discussed Section 1 of the bill. She noted that in Montana currently they determine whether an individual moving into Montana from another state has a record and if their conviction is comparable to an offense requiring registration in Montana. She indicated that in some states there are sex offenses on the books that Montana does not have. If this occurs, Section 1 would allow Montana to make these offenders register. She stated that this was a public safety issue.

She discussed Section 2 which would clarify the registration procedures. She noted that it would require all offenders, except for those who register initially with the Department of Corrections, to register with the appropriate local law enforcement agencies.

Ms. Bovington informed the Committee that Section 3 would clarify the change of address requirement. She noted that the law 46-23-505 requires offenders who change their address to notify the agency with whom they last registered. This section of the bill would state that the Department of Corrections had to be notified of their change in address.

She expressed that Section 4 would clarify that violent offenders must petition the sentencing court or the district court where the offender resides before they are released from the duty to register. She indicated that violent offenders are required to register for ten years, at which time they are dropped off the registration rolls unless they have been convicted of another felony during that ten-year period. She wanted to see the burden returned to the offender. The primary reason she gave for this was that while criminal history records are good they are not always perfect.

The last section she discussed was Section 6. She explained that this section would allow them to recognize risk level designations given by another state or the federal government when offenders are moved into Montana. She reiterated that this would be a public safety measure. During her presentation, she passed out a Department of Justice fact sheet on HB 49.

EXHIBIT(jus56b04)

{Tape: 1; Side: B; Approx. Time Counter: 4.2 - 12.2}

Brenda Thompson, an Attorney with the Department of Corrections, spoke in support of HB 49. She claimed that the changes in Section 2 would accurately reflect how the sex offender registration process was currently occurring. She asserted that sex offender registration occurred at local law enforcement. She stated that if a sex offender has not registered then a probation and parole officer could seek to revoke their probation. She noted that Section 2, Subsection 1B, made it an obligation of the prison to start the registration of the individual at least ten days prior to release.

{Tape: 1; Side: B; Approx. Time Counter: 12.2 - 16.2}

Jim Smith, Representing Montana Sheriffs and Peace Officers Association and Montana County Attorney's Association, expressed that the registration requirement for an offender to register with the chief of police or the sheriff was logical. He felt that the accountability and responsibility should be paired. He noted that the county attorneys would be willing to take on the responsibility given to them in Section 4 of the bill.

{Tape: 1; Side: B; Approx. Time Counter: 16.2 - 17.5}

Harris Himes, Representing the Montana Family Coalition, supported the bill conceptually. He thought that it would be a good thing to do in order to protect families.

{Tape: 1; Side: B; Approx. Time Counter: 17.5 - 18.1}

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. JIM SHOCKLEY, SD 45, VICTOR, referenced Page 2, Lines 5-6. He understood this section to mean that if someone has committed a crime in another state that is not a crime in Montana, they would still have to register in Montana as a sex offender.

Ms. Bovington replied that if the state where he was convicted, classified that offense as a sex offense, the offender would be required to register in Montana as a sex offender.

SEN. SHOCKLEY followed up by asking if that would occur even if whatever the individual had done would not be a crime in Montana.

Ms. Bovington responded that it could be a crime in Montana, but not one that required registration, or it could be a crime that was not in Montana's books.

CHAIRMAN WHEAT wanted to know what felony voyeurism was.

Ms. Bovington promised to provide him with the definition.

{Tape: 1; Side: B; Approx. Time Counter: 18.1 - 20}

SEN. MCGEE cited Section 28, Subsection 2, of the Constitution. He wanted to know if they had considered that issue in light of the proposal to require the individual to appeal to the court for the cessation of registration at ten years. He felt that the

person had fulfilled their sentence and should not have to do something further when it was really a bookkeeping issue.

Ms. Bovington replied that they had considered the issue and, in the State of Montana vs. Robert Mount, Mr. Mount, a sex offender, had challenged the retroactive applicability provisions of the law based on ex post facto grounds and restoration of rights grounds. She indicated that the court had determined that the requirements of the registration act were a civil regulatory scheme and not punishment, thus not evoking the Restoration of Rights Clause of the Constitution. She was, therefore, not worried about the provision raising constitutional issues.

{Tape: 1; Side: B; Approx. Time Counter: 20 - 21.8}

SEN. MCGEE restated that the court had decided that the registration portion was a civil issue.

Ms. Bovington affirmed this statement and promised to provide a copy of the decision.

SEN. GARY PERRY, SD 35, MANHATTAN, asked if there was any need for coordination between HB 49 and SB 207, the GPS monitoring of Level 3 offenders.

Ms. Bovington did not think that there would be a need for coordination because SB 207 would be a condition of probation and parole while HB 49 was a civil regulatory issue.

{Tape: 1; Side: B; Approx. Time Counter: 21.7 - 22.9}

SEN. PERRY followed up stating that he had been concerned about cases such as a case in Massachusetts where a judge, as a condition of a sentence, ordered that the offender move to Montana. He did not want Montana to be a boneyard for sexual offenders from other states. He wanted to know if it was possible, if this bill passed, that they could designate a level-three offender and monitor them.

Ms. Bovington wondered if this was in connection with the GPS monitoring.

SEN. PERRY clarified that in addition to registration he wanted to know if they could monitor a level three offender who moved to the state.

Ms. Bovington thought that most states would limit that to a condition of probation and parole and it has not been expanded to someone who has completed their term of probation and parole.

CHAIRMAN WHEAT left the hearing at 8:53 A.M. **SEN. MCGEE** was acting as chair.

SEN. JEFF MANGAN, SD 12, GREAT FALLS, wondered if there were amendments prepared by the Department of Corrections or if they would want the Committee to come up with them on their own.

Ms. Thompson replied that she had an amendment prepared but would like to discuss it with Ms. Bovington and the sponsor.

{Tape: 1; Side: B; Approx. Time Counter: 22.9 - 26.3}

SEN. JESSE LASLOVICH, SD 43, ANACONDA, wanted to know why on Line 14 it was "may" and not "must petition the court".

Ms. Bovington responded that the reason was that for sex offenders it was clear that to be released from registration they have to petition the court. She thought that the "may" was there so that if they did not petition the court then they would be required to continue to register. She asserted that there would be no hassle if the offender decided not to petition the court.

{Tape: 2; Side: A; Approx. Time Counter: 0 - 1.5}

Closing by Sponsor:

REP. WILSON thought that this bill would make the laws more workable. He promised to go over the amendments. He indicated that **SEN. MANGAN** had agreed to carry the bill on the Senate floor.

VICE CHAIR MCGEE closed the hearing on HB 49 and opened the hearing on HB 191.

{Tape: 2; Side: A; Approx. Time Counter: 1.5 - 2.4}

HEARING ON HB 191

Opening Statement by Sponsor:

REP. ARLENE BECKER (D), HD 52, opened the hearing on **HB 191,** Clarify application of spousal privilege to certain communications.

REP. BECKER informed the Committee that the basic purpose of HB 191 was to clarify that spousal privileges and communications apply only to communications made during a marriage. She indicated that the gist of the bill began on Line 15 where it

says that only communications made during a marriage are privileged communications. She noted that there was another part to the bill, starting at Line 21, where they added that it did not include communications in the case of a criminal action or proceeding.

{Tape: 2; Side: A; Approx. Time Counter: 2.4 - 4.5}

Proponents' Testimony:

Ali Bovington, Representing the Attorney General's Office, provided a fact sheet on HB 191. She covered the fact sheet in her testimony. She asserted that HB 191 sought to clarify that the spousal privilege would only apply to those communications that are made within the actual context of a marriage relationship.

EXHIBIT(jus56b05)

{Tape: 2; Side: A; Approx. Time Counter: 4.5 - 7.2}

Opponents' Testimony: None.

Informational Testimony: None.

Questions from Committee Members and Responses:

SEN. SHOCKLEY thought that the bill said the same thing before the modification as it did after the modification.

Ms. Bovington replied that the attorneys who worked on the bill thought that the Supreme Court had gotten it wrong. They thought that the way the law was previously written, the testimony should have been excluded. She asserted that the relevant added language was on Lines 15-16 concerning any communication made from one spouse to another during their marriage.

SEN. SHOCKLEY pointed out Line 13. He did not think that the Supreme Court would like it this time around either.

{Tape: 2; Side: A; Approx. Time Counter: 7.2 - 9.4}

SEN. PERRY cited Line 12-13. He wanted to know if it indicated the basis on which the Supreme Court made its decision.

Ms. Bovington explained that the language was still present in the bill in Lines 15. She stated that it was accepted law in criminal cases that there is spousal privilege and the way in which it could be overcome is if the spouse gives their partner

their consent to testify. She returned to **SEN. SHOCKLEY'S** question. She thought that the pertinent language was Lines 17-18, where it talks about the privileges restricted to communications made during the existence of the marriage relationship and did not extend to communications made prior to the marriage.

{Tape: 2; Side: A; Approx. Time Counter: 9.4 - 11.3}

SEN. BRENT CROMLEY, SD 25, BILLINGS, cited the change in Line 21. He indicated that the exclusion did not apply to a case involving a child but it would after the passage of the bill.

Ms. Bovington agreed that it was a change to current law. She asserted that it was trying to get at the cases where there is some sort of criminal conduct against the child and not precluding one parent from testifying about that conduct.

SEN. CROMLEY followed up asking if individuals had been able to assert the spousal privilege in the past.

Ms. Bovington believed that individuals had been able to assert their spousal privilege in the past.

{Tape: 2; Side: A; Approx. Time Counter: 11.3 - 12.4}

SEN. SHOCKLEY asked if the rules of evidence addressed the waiver of spousal privilege in spousal/child abuse situations.

Ms. Bovington replied that they might.

{Tape: 2; Side: A; Approx. Time Counter: 12.4 - 12.7}

Closing by Sponsor:

REP. BECKER told **SEN. PERRY** that he was correct in pointing out Lines 12-13. She noted that those lines had been interpreted by the Supreme Court very literally. She asserted that they were trying to make the language clearer with this statute. She informed the Committee that **SEN. ELLINGSON** would carry the bill on the Senate floor.

{Tape: 2; Side: A; Approx. Time Counter: 12.7 - 13.4}

VICE CHAIR MCGEE closed the hearing on HB 191 and opened the hearing on HB 696.

HEARING ON HB 696

Opening Statement by Sponsor:

REP. JOEY JAYNE (D), HD 15, opened the hearing on **HB 696**, Clarify ethnic, cultural, and religious maintenance in child removal from home.

REP. JAYNE informed the Committee that the bill before them was amended. She indicated that the main amendment was on Page 1, Section 2, Subsection B, Line 24. She reported that the bill would add language which would ensure that whenever removal from the home is necessary the youth is entitled to maintain ethnic, cultural, and religious heritage whenever appropriate. She asserted that the same language already existed in current law. However, it existed under the child abuse and neglect statute. She attested that this portion of the code spoke of the Youth Court Act, which is where youth are adjudicated. The reason she gave for putting the language into the Youth Court Act was to recognize and encourage that in order for the youth to become a better person in society they need to maintain religion and culture. She informed the Committee that Steve Gibson, Head of the State Juvenile Corrections, was a proponent who was not able to attend the hearing. She reserved the right to close.

{Tape: 2; Side: A; Approx. Time Counter: 13.4 - 17.5}

Proponent:

Steve Gibson, Representing the State Juvenile Corrections was an absent proponent.

Proponents' Testimony: None.

Opponents' Testimony: None

Informational Testimony: None.

Questions from Committee Members and Responses: None.

Closing by Sponsor:

REP. JAYNE reiterated that the bill would ensure that when there is a removal of a youth from the home the youth is entitled to maintain ethnic, cultural, or religious heritage whenever appropriate. She indicated that the end result they were looking for was to have the youth return home happy, having paid restitution, received treatment, and return to society. She urged passage of the bill as amended.

{Tape: 2; Side: A; Approx. Time Counter: 17.5 - 18.8}

VICE CHAIR MCGEE closed the hearing on HB 696.

The Committee took a ten minute break, reconvening at 9:25 A.M.

VICE CHAIR MCGEE gave the order of Executive Action; HB 97, HB 98, HB 285, HB 345, HB 349, HB 363, HB 367, HB 409, and HB 726.

EXECUTIVE ACTION ON HB 97

VICE CHAIR MCGEE reminded the Committee that this bill was an act for negligent homicide while operating a vehicle under the influence.

Motion: **SEN. O'NEIL moved that HB 97 BE CONCURRED IN.**

Discussion: **SEN. SHOCKLEY** had a problem with a portion of the bill. He objected to the first part of the title. He indicated that when a negligent homicide is charged and there is alcohol involved, the prosecution always charges the additional crime of driving under the influence. He did not see why there was a need for this bill if the prosecutors were competent. He indicated that they would not be able to take this section out of the bill.

Valencia Lane, Legislative Fiscal Division, agreed that taking that section out would change the nature of the bill, because it was drafted as a negligent homicide bill. She also reminded the Committee to keep in mind HB 46, **REP. PARKER'S** bill which dealt with vehicular homicide while under the influence.

{Tape: 3; Side: A; Approx. Time Counter: 0 - 4.4}

SEN. SHOCKLEY presented another concern. He cited Page 2.

VICE CHAIR MCGEE asked if **SEN. SHOCKLEY** was in support of the bill.

SEN. SHOCKLEY responded that he was not in support of the bill wholeheartedly

SEN. CROMLEY wondered if a person was involved in an offense, such as Driving Under the influence (DUI) and homicide, could be found guilty of both. He clarified his question, asking if an individual could be found guilty of both a DUI and vehicular homicide rising from the same instance.

SEN. SHOCKLEY responded that they could and in fact, remarked that it was usually the way it occurred. He asserted that the only way that an individual could not be charged with both was through incompetence or a deal. He indicated that it was something that they could not change.

Vote: Motion carried 9-3 by voice vote with SEN. LASLOVICH, SEN. PERRY, and SEN. SHOCKLEY voting no and SEN. WHEAT voting aye by proxy.

{Tape: 3; Side: A; Approx. Time Counter: 4.4 - 8.8}

EXECUTIVE ACTION ON HB 98

Motion: SEN. MANGAN moved that HB 98 BE CONCURRED IN.

Discussion: SEN. JESSE LASLOVICH, SD 43, ANACONDA, understood what **REP. LANG** was trying to do with the bill and agreed that something needed to be done with persistent DUI offenders. However, he opposed the bill because of the "no provision for a restricted license". He felt that for a first time offender a suspended license for six months would be enough and they did not need to take away a license for a year.

{Tape: 3; Side: A; Approx. Time Counter: 8.6 - 12.7}

SEN. JEFF MANGAN, SD 12, GREAT FALLS, agreed with the points that **SEN. LASLOVICH** made. He suggested they use the new language where an individual would have a suspension for a year with the provision for a restricted probationary license after six months and three years with the ability for a restricted probationary license after one year. He thought that this might be an acceptable compromise.

SEN. JERRY O'NEIL, SD 3, COLUMBIA FALLS, indicated that **SEN. LASLOVICH** had changed his mind on how he was going to vote for the bill. He remarked that he has always thought that the breath test was self incrimination. He saw this bill as punishment for not incriminating yourself.

{Tape: 3; Side: A; Approx. Time Counter: 12.7 - 15.8}

SEN. SHOCKLEY noted that it was his experience that DUI 1s hardly ever become DUI 2s. However, if someone has received a second then they are likely to get a third and fourth and so on. He felt that increasing the punishment would not increase the number of people who take the breath test. He wanted the enhanced

penalty to apply to people who have already received a conviction. He could not support the bill as it was, however.

SEN. PERRY attested that if a person was pulled over, asked to do a breath test, and subsequently refused, the officer would still be able to administer the field sobriety test and could take the person in for a breath test at the station.

SEN. SHOCKLEY responded that if an individual is pulled over, and the officer has reasonable suspicion that the individual is drinking, the officer can ask them to take a breath test that is not admissible in court or to take the field sobriety test. He asserted that the refusal to blow into the handheld breath test was not a refusal in his understanding.

{Tape: 3; Side: A; Approx. Time Counter: 15.8 - 19.9}

SEN. PERRY followed up, asking, if a person refuses a breath test but passes a field sobriety test, which is video taped, and future court action reduces the DUI to a lesser offense, based on the evidence in court, would the law that says refusal of a breath test requires a suspension of a license still be enforced.

SEN. SHOCKLEY clarified that if there is a handheld breath test and the individual refuses that, it is not a refusal and would not be admissible in court. He stressed that the refusal that would count was the one in the police station where they have the Intoxilizer 5000.

{Tape: 3; Side: A; Approx. Time Counter: 19.9 - 21.3}

SEN. LYNDA MOSS, SD 26, BILLINGS, observed that there were no groups that represented a statewide perspective. She liked the suggestion put forth by **SEN. MANGAN** and **SEN. SHOCKLEY** to look at amendments. She felt that she could not support the bill as it stood.

SEN. O'NEIL agreed with **SEN. SHOCKLEY.** However, the partition ratio, the passage of oxygen from blood to lungs, differs in different people. Therefore, the results of the machine are not as accurate as the machine itself because of the partition ration between different people.

VICE CHAIR MCGEE commented that he did not mind penalizing someone severely for something that they do which is wrong. But he felt that the bill was making it that much harder for someone to keep from testifying against themselves.

Vote: Motion failed 1-11 by voice vote with SEN. MANGAN voting aye and SEN. WHEAT voting no by proxy.

Motion/Vote: SEN. LASLOVICH moved that HB 98 BE TABLED AND THE VOTE REVERSED. Motion carried unanimously by voice vote with SEN. WHEAT voting aye by proxy.

{Tape: 3; Side: A; Approx. Time Counter: 21.3 - 24.9}

At this time, **SEN. CROMLEY** left the meeting.

EXECUTIVE ACTION ON HB 285

Motion/Vote: SEN. MANGAN moved that HB 285 BE CONCURRED IN. Motion passed unanimously with SEN. WHEAT and SEN. CROMLEY voting aye by proxy.

{Tape: 3; Side: B; Approx. Time Counter: 0 - 0.7}

SEN. COCCHIARELLA was identified as the senator who would be carrying the bill on the floor.

At this time, **SEN. CROMLEY** returned to the meeting.

EXECUTIVE ACTION ON HB 345

Motion: SEN. SHOCKLEY moved that HB 345 BE CONCURRED IN.

Discussion: SEN. O'NEIL attempted to explain the bill to **SEN. SHOCKLEY** per his request. He indicated that the bill would allow an individual more time to do an action for fraudulent transfer.

SEN. SHOCKLEY expressed that he still did not think that he would be able to explain the bill on the floor.

VICE CHAIR MCGEE noted that there had been a memo handed out on HB 345.

EXHIBIT(jus56b06)

SEN. O'NEIL referenced Line 21. He wanted to know who the other claim in this sentence would belong to.

SEN. SHOCKLEY guessed that it would be a third party claimant.

VICE CHAIR MCGEE commented that he would not vote for the bill because it was not understandable, even to lawyers and those who had written it.

Motion: SEN. O'NEIL moved that HB 345 BE AMENDED BY STRIKING SUBSECTION 2, LINES 21-22 AND APPROPRIATE LANGUAGE IN THE TITLE.

EXHIBIT(jus56b07)

Discussion: **VICE CHAIR MCGEE** asked if it would void the title of the bill.

Ms. Lane replied that in the title of the bill they would have to strike on Lines 5-7, starting after "may be filed;" and up to "amending section".

Vote: Motion carried 11-1 by voice vote with SEN. LASLOVICH voting no and SEN. WHEAT voting aye by proxy.

{Tape: 3; Side: B; Approx. Time Counter: 0.7 - 6.7}

Motion/Vote: SEN. MANGAN moved that HB 345 BE CONCURRED IN AS AMENDED. Motion carried 9-3 by voice vote with SEN. CURTISS, SEN. MCGEE, and SEN. PERRY voting no with SEN. WHEAT voting aye by proxy.

Motion/Vote: SEN. MANGAN moved to RECONSIDER THE MOTION on HB 345. Motion carried unanimously by voice vote with SEN. WHEAT voting aye by proxy.

{Tape: 3; Side: B; Approx. Time Counter: 6.7 - 8.5}

Motion: SEN. SHOCKLEY moved that HB 345 BE CONCURRED IN AS AMENDED.

Discussion: SEN. PERRY restated a question that he had asked **REP. GALLIK** based on his testimony, that, if a person transfers assets because they know they are going to lose a case his question was, "How does a person know that they were going to lose a case? How do we have confidence in this system of justice if we know beforehand we are going to lose the case?"

SEN. CROMLEY responded that they do not know that they are going to lose the case, they are just worried that they are going to.

VICE CHAIR MCGEE added that some people know they are guilty and will try to protect their position.

SEN. PERRY attested that this was the reason that 94% of the cases are settled. He added that there was a case in federal state tax law of anticipation of death. He wanted to clarify if they were talking about assets that were transferred after a lawsuit was filed or in anticipation of a potential lawsuit.

{Tape: 3; Side: B; Approx. Time Counter: 8.5 - 10.9}

SEN. JON ELLINGSON, SD 49, MISSOULA, believed that the law on fraudulent transfer addressed both of those considerations.

SEN. PERRY said that if the bill said, any transfer of assets that someone considers in anticipation of a lawsuit that has not been filed, then it opens it up so broadly that any transfer could be construed that way if any claim is brought after the transfer regardless of the reason for the transfer.

SEN. ELLINGSON did not think that it opened up all transfers. He believed that it had to be a transfer made without consideration. He noted that it would not be a fraudulent transfer if the individual had a transfer of fair market value.

SEN. SHOCKLEY asserted that fraud was hard to prove and it still had to be taken to court in order to determine if the transfer was fraudulent.

{Tape: 3; Side: B; Approx. Time Counter: 10.9 - 13.7}

VICE CHAIR MCGEE asked what the difference would be between a transfer with no fair market value return and a gift.

SEN. ELLINGSON indicated that it would go to the issue of fraudulent intent. If an individual had a consistent history of giving their children $20,000 a year, they would have a good argument that it was not a fraudulent conveyance. However, if an individual has never given anything to family before, it would be evidence that it was fraudulent.

SEN. SHOCKLEY informed the Committee that when there is a fraudulent consideration there are around seven elements and is very hard to prove.

SEN. PERRY commented that under the scenario described by **SEN. ELLINGSON,** there could also be a transfer to one's spouse or family members for the purposes of estate planning. He reiterated that it was too broad.

Vote: Motion carried 9-3 by voice vote with SEN. CURTISS, SEN. MCGEE, and SEN. PERRY voting no with SEN. WHEAT voting aye by proxy.

{Tape: 3; Side: B; Approx. Time Counter: 13.7 - 16.7}

SEN. LASLOVICH offered to carry the bill on the Senate floor.

EXECUTIVE ACTION ON HB 349

Motion: SEN. MANGAN moved that HB 349 BE CONCURRED IN.

Discussion: SEN. CROMLEY distributed an amendment to the Committee.

EXHIBIT(jus56b08)

Motion: SEN. CROMLEY moved that HB 349 BE AMENDED.

Discussion: SEN. CROMLEY explained that the amendment dealt with the language on Page 2, Subsection 2. He thought that they should remain in the statute and thus the amendment would add them in a new subsection.

SEN. O'NEIL asserted that **SEN. CROMLEY'S** bill stated that a peace officer should do certain things, yet throughout the remainder of the bill it said that the peace officer would not be held liable if they didn't do these things.

SEN. CROMLEY remarked that the statute would allow an individual to be taken into protective custody by the arresting officer. He indicated that his amendment had the original duties with regard to the care of the person being detained.

{Tape: 3; Side: B; Approx. Time Counter: 16.7 - 21}

Vote: Motion carried unanimously by voice vote with SEN. WHEAT voting aye by proxy.

Ms. Lane related that **SEN. PERRY** had asked her to do an amendment on Page 1, Line 30.

Motion: SEN. PERRY moved that HB 349 BE AMENDED.

Discussion: SEN. SHOCKLEY supported the second amendment.

Vote: Motion carried unanimously by voice vote with SEN. WHEAT voting aye by proxy.

{Tape: 3; Side: B; Approx. Time Counter: 21 - 22.8}

Motion: SEN. MANGAN moved that HB 349 BE CONCURRED IN AS AMENDED.

Motion: SEN. O'NEIL moved that HB 349 BE AMENDED BY STRIKING SUBSECTION 3, LINES 23-25, PAGE 1, AND SUBSECTION 2, PAGE 2, LINES 7-9.

Discussion: **VICE CHAIR MCGEE** commented that if this amendment passed it would overturn the entire purpose of the bill.

SEN. O'NEIL did not agree. He thought that the purpose of the bill was contained in the previous amendments and the bill itself. He thought that he was taking out sovereign immunity.

VICE CHAIR MCGEE repeated the proposed amendment.

SEN. MANGAN suggested that if a Committee member were so inclined to vote for **SEN. O'NEIL'S** amendment they should just vote against the bill and kill the bill because he felt that is what the amendment would do.

{Tape: 3; Side: B; Approx. Time Counter: 22.8 - 24.8}

SEN. CROMLEY thought that the bill would still allow the intoxicated person to be taken into protective custody. He clarified that the bill did two things: 1) allow an intoxicated person to be taken into protective custody, and 2) give immunity to the peace officer. He asserted that he would support the amendment.

Ms. Lane pointed out that they had been discussing the fact that the bill would still allow an individual to be taken into protective custody. She reminded the Committee that the title of the bill on Lines 7-8 removed the distinction between intoxicated and incapacitated. She noted that Subsection 1 of the bill would still allow detaining a person, but it would do away with the concept of protective custody of those incapacitated by alcohol. She agreed with **SEN. MANGAN'S** idea that if a Committee member did not like what the bill did then they should vote against the bill.

SEN. MCGEE indicated that the first amendment by **SEN. CROMLEY** would eliminate half of the title of the bill and if they adopted

the amendment by **SEN. O'NEIL** he felt that the other half of the bill would be eliminated.

Ms. Lane commented that on the back of the amendment, HB034901, the language that originally existed, which **SEN. CROMLEY** wanted back in the bill, existed in the protective custody section. She noted that since that had all been removed, the language would apply to detaining a person who is intoxicated. She would not say that **SEN. CROMLEY'S** amendment took away half of the bill, although they were still eliminating the requirements of protective custody.

{Tape: 4; Side: A; Approx. Time Counter: 0 - 2.4}

SEN. ELLINGSON reminded the Committee that a part of the bill was to do away with the distinction between intoxicated and incapacitated. He expressed that the peace officer had to wait until a person showed signs of incapacitation before they could take them into custody currently. He felt that the bill would allow the peace officers to take into custody an individual who was intoxicated but not incapacitated. He thought that it was an important part of the bill.

At this time, **SEN. MCGEE** left the hearing. **SEN. CROMLEY** became vice chair and **SEN. PERRY** held **SEN. MCGEE'S** proxy.

SEN. CURTISS supported **SEN. O'NEIL'S** amendment. She related a story about her son. She thought that it was serious to remove law officers from liability relative to their actions.

{Tape: 4; Side: A; Approx. Time Counter: 2.4 - 5.4}

SEN. PERRY reminded **SEN. CURTISS** and **SEN. O'NEIL** that the bill said "appears to be intoxicated", "until the person is no longer creating a risk to self or others", and "a good faith act". He indicated that the bill was trying to assist the police officers in public safety and caring for persons who appear to be intoxicated or a risk to him or herself. He stressed that they were trying to get away from placing the liability on the police officers if they were doing their job.

SEN. MANGAN thought that, if they passed the amendment, it would be hard for a police officer to help those who are intoxicated and protect the public from them.

<u>Vote</u>: Motion failed 6-6 by roll call vote with SEN. MANGAN, SEN. MCGEE, SEN. MOSS, SEN. PEASE, SEN. PERRY, and SEN. SHOCKLEY voting no with SEN. WHEAT and SEN. MCGEE VOTING BY PROXY.

{Tape: 4; Side: A; Approx. Time Counter: 5.4 - 10.6}

Vote: Motion carried 9-3 by voice vote with SEN. CURTISS, SEN. O'NEIL, and SEN. WHEAT voting no with SEN. WHEAT voting by proxy.

SEN. MANGAN offered to carry the bill on the Senate floor.

EXECUTIVE ACTION ON HB 363

Motion: SEN. SHOCKLEY moved that HB 363 BE CONCURRED IN.

Discussion: SEN. SHOCKLEY brought up SB 172. He thought that SB 172 was more clear and succinct as well as accomplish the same thing.

Ms. Lane reported that SB 172 had been tabled in the House committee. She added that the request came from the sponsor of SB 172 to see if it could be rolled into HB 363. She asserted that in order for her to do that she needed a request from a member of this Committee.

SEN. O'NEIL mentioned that **SEN. GEBHARDT** had spoken with him and at one point thought that HB 363 would cover what SB 172 was meant to cover. However, he did not think that the bill would cover it unless they added an amendment. He suggested that if, following Line 19, they added "during an emergency response" HB 363 would cover SB 172.

Ms. Lane commented that it would not be that simple. She thought that it would take a more specific amendment. She expressed that HB 363 was drafted to apply only to healthcare providers in a healthcare institutional setting. She explained that the House had specifically taken the language from that section out because they did not want to expand the section of the law to include emergency providers. She insisted that she had to have an indication of the policy decision the Committee wanted made with their amendments.

{Tape: 4; Side: A; Approx. Time Counter: 10.6 - 15.9}

SEN. SHOCKLEY suggested putting the bill aside.

VICE CHAIR CROMLEY cited HB 363 providing for "healthcare provider performing emergency services". He wanted to know if this section would include an emergency responder.

Ms. Lane claimed that this language was one of the problems with coordinating HB 363 and SB 172. She indicated that HB 363 would

only provide immunity for healthcare providers that are defined by 50-4-504 while SB 172 would apply to all kinds of emergency responders.

SEN. O'NEIL withdrew his motion to amend HB 363.

SEN. SHOCKLEY withdrew his motion to concur in HB 363.

{Tape: 4; Side: A; Approx. Time Counter: 15.9 - 18.4}

EXECUTIVE ACTION ON HB 367

Motion: SEN. MANGAN moved that HB 367 BE CONCURRED IN.

Discussion: SEN. O'NEIL wanted to strike Subsection 10 from the bill so that it would leave the law in existence about who may appear and act as an attorney in a justice court.

Motion: SEN. O'NEIL moved that HB 367 BE AMENDED BY DELETING SECTION 10.

Discussion: SEN. O'NEIL related that the reason he wanted to strike this section was that present law states that a person going into a justice court can have a parent, spouse, or friend appear and speak for them in the justice court. He thought that if Section 10 were amended then they would not have any help in a justice court.

SEN. PERRY asked if a justice in a justice court of record need not be an attorney.

SEN. CROMLEY replied that the bill would allow a justice court to be a court of record. However, they had not changed the law providing whether or not the judge needed to be an attorney to serve in a justice court or a justice court of records. He believed that a justice did not need to be an attorney.

SEN. PERRY asked, if a judge did not need to be an attorney, then why would a person representing an individual be required to be an attorney.

SEN. CROMLEY responded that the judge was required to go through a certain number of training hours.

{Tape: 4; Side: A; Approx. Time Counter: 18.4 - 23.5}

SEN. SHOCKLEY asked for clarification on the amendment. He wanted to know if **SEN. O'NEIL** wanted to strike all of Section 10 or the portion of the statute that would be amended.

SEN. O'NEIL clarified that if they did not amend Section 10 they would not allow a non-attorney to represent someone in a justice court but allowing someone's parent, friend, etc., to help them on a one-time-only basis in justice court.
{Tape: 4; Side: A; Approx. Time Counter: 23.5 - 24.8}

Vote: Motion failed 3-9 by voice vote with SEN. MCGEE, SEN. O'NEIL, and SEN. PERRY voting aye and SEN. WHEAT voting no by proxy.

SEN. O'NEIL commented that an individual is not allowed to have anyone come with them to justice court to speak on their behalf. He expressed that without this bill the individual would have been allowed to have someone else with them. He asserted that they would not be able to have a jury trial in a district court because they were stuck to the record created by the justice court. He thought that they needed to kill the bill.

Vote: Motion carried 7-5 by voice vote with SEN. CURTISS, SEN. MCGEE, SEN. O'NEIL, SEN. PERRY, and SEN. SHOCKLEY voting no with SEN. WHEAT voting aye by proxy.

{Tape: 4; Side: A; Approx. Time Counter: 24.8 - 29.6}

SEN. MANGAN offered to carry HB 367 on the Senate floor.

{Tape: 4; Side: A; Approx. Time Counter: 29.6 - 30.4}

Additional documents include a letter to the Committee from the Honorable Wayne Phillips regarding HB 280.

EXHIBIT(jus56b09)

ADJOURNMENT

Adjournment: 12:00 A.M.

_____
SEN. MIKE WHEAT, Chairman

_____
MARI PREWETT, Secretary

_____
BRITT NELSON, Transcriber

MW/mp/bn

Additional Exhibits:

EXHIBIT(jus56bad0.PDF)