MINUTES

MONTANA SENATE
56th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on February 16, 1999 at 8:00 A.M., in Room 325 Capitol.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Duane Grimes (R)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Walter McNutt (R)

Members Excused: None.

Members Absent: None.

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

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 435, SB 461, SB 463, 2/13/1999
Executive Action: SB 320, SB 328, SB 404, SB 435

EXECUTIVE ACTION ON SB 320

Motion: **SEN. HOLDEN** moved that **SB 320 DO PASS.**

Discussion:

SEN. DOHERTY explained amendments SB032002.avl, **EXHIBIT(jus38a01)**. Amendment no. 2 addressed that the injured person was convicted of a failure to be insured and not just that the person's vehicle was involved in the accident and the injured person could not establish financial responsibility. Amendments no. 3 and 4 address whether an insurer would be liable. An insurer is not sued as the result of an accident. The person who is in the accident is sued. Amendments no. 5, 6, 7, and 8 go to the section of the bill on limits of recovery by a person involved in a felony. He saw no problem with limiting a person's ability to recover during a felony. If an individual is charged and convicted, he did not see a problem. However, if the individual is charged and then later found not guilty and their ability to recover has been eliminated, he did see a problem. The question is whether a criminal standard of beyond a reasonable doubt is used or a civil standard of preponderance of the evidence is used. The two standards are entirely different and their application could restrict an injured person who is innocent.

Motion: **SEN. DOHERTY** moved that **SB 320 BE AMENDED - AMENDMENTS 1 AND 2.**

Discussion:

SEN. HOLDEN opposed the amendments and contended that the bill attempts to establish a pattern. This portion of the bill speaks to mandatory insurance. The legislature has established mandatory insurance as a standard. Having an automobile is a privilege. When you violate the statutes of Montana with relation to mandatory insurance, a penalty is involved which is outlined in statute. This bill establishes a pattern of breaking the penalty. The second time an individual is caught and doesn't have insurance, that person is demonstrating that he or she has a pattern of not purchasing insurance and doesn't care about whether the person he may injure is able to collect. A clause that would require property damage or bodily injury to occur goes against the intent of the bill.

SEN. DOHERTY remarked that a penalty which limits someone's ability to recover damages when they are injured needs to be more specific. If the harm we are addressing is that people who are not insured are waiting to collect from others and this would prevent that situation from happening, the language needs more detail.

The wording "the injured person could not establish financial responsibility" isn't a conviction of failure to establish financial responsibility. In practice, the officer may stop

someone and give them a warning ticket. The individual is then able to establish financial responsibility.

SEN. HOLDEN held that this would render the bill useless.

Vote: The motion failed on roll call vote - 3 to 5.

Motion: SEN. DOHERTY moved that **SB 320 BE AMENDED - AMENDMENTS 3, 4, AND 7.**

Discussion:

SEN. DOHERTY remarked that this limits the ability of the injured person to recover from the tortfeasor. If the insurer is not liable, the individual will be liable and the insurance company is off the hook.

Ron Ashabraner, State Farm Insurance, stated that when there is an accident, the insurance company retains counsel for defense of the individual. The attorney does not represent the insurance company. The attorney represents the insured. If the insurance company violates anything, there is the Unfair Claims Settlement Practice Act.

SEN. BARTLETT questioned why the insurance company would retain counsel for the insured if the insurer had no liability. **Mr. Ashabraner** explained this involves the insured's money. The insured has paid to have an attorney represent them and also to have any type of judgment awarded against him compensated by the insurance company. The party of interest is the insured so the action is against the insured.

SEN. BARTLETT related that without the amendments, the insurer has no liability. The individual who is being sued would carry the liability out of his or her own pocket. **Mr. Ashabraner** affirmed that this is the current situation. The insurance company does not have a liability that extends to the injured party. The contract exist between the insurance company and the negligent party.

SEN. BARTLETT questioned whether the insurer would have an interest in seeing that the individual paid out of his or her own pocket when they could not come back on their insurance. **Mr. Ashabraner** maintained that the company has an obligation to protect its insured. The obligation is to reimburse for any claim that is made, if the claim is righteous.

SEN. BARTLETT related that as an insured, she would like to have a motivation for the insurer to be guaranteed to come to her

defense. She doesn't believe that the bill provides that incentive, but it would be provided in the amendment.

SEN. HOLDEN insisted that on page 2, line 15, the person in the accident was kept from having to individually pay the damages. Line 18 treats the insurance carrier equally. If you take out this part, it would state that the person individually does not have to pay but his insurance carrier does.

SEN. BARTLETT maintained that (6) is limited to the instances in which the individual who caused the accident was impaired, presumably under a DUI. This is a very narrow set of circumstances. Subsection (7) states that except as provided in (6) the insurer is not liable. If an impaired driver caused the accident, the insurer remains liable to defend the injured person who was injured by the impaired driver. She did not see a disconnect between (6) and (7).

SEN. HOLDEN claimed that the intent of the bill is that not only should the relief be provided to the person driving the car that was involved in the accident but also to his insurance carrier. If you do not protect one, you are not protecting the other.

SEN. BARTLETT added that (5) states that a person who did not carry insurance is not eligible to recover noneconomic damages. In (7) the insurer is not liable for noneconomic damages. There is a better incentive for the insurance company to be there defending the case if (7) is eliminated.

SEN. JABS remarked that amendment no. 7 addressed the section on felons. He preferred that this be kept separate.

Substitute Motion: **SEN. DOHERTY** moved that **SB 320 BE AMENDED - AMENDMENT 3.**

Discussion:

SEN. HOLDEN insisted that this amendment would provide that the violator could simply pursue the insured person's insurance company for noneconomic damages. He opposed the amendment.

SEN. DOHERTY remarked that the first part of the bill limited damages recovered from a tortfeaser. In Section 7, the language states that an insurer is not liable. This gives the insurance company immunity.

Vote: **The motion carried on roll call vote - 5-4.**

Motion: **SEN. DOHERTY** moved that **SB 320 BE AMENDED - AMENDMENTS 5 & 6.**

Discussion:

SEN. DOHERTY clarified that the amendments address limits on recovery for a person involved in a felony. If damages occurred during the person's commission of, attempt to commit, or immediate flight from a felony. For example, if someone robbed a bank in Ekalaka and was traveling to their hideout in Troy, this could take three to four days. This person could be involved in an accident and the injuries result in that person becoming a quadriplegic. Alternatively, the robber could take a week off and then travel to his or her home and be involved in an accident. The person who caused the accident may have a large amount of insurance. Normally that person would pay where the liability was clear. Under the bill, if the robber is discovered and convicted, that person could not recover from the insurance company. If this person is convicted of the crime and ends up in prison, the taxpayers would end up paying the medical bills. This amendment would limit the provision to injuries that occurred during the felony.

SEN. HOLDEN asked that the Committee accept the amendments.

Vote: **The motion carried unanimously - 9-0.**

Motion: **SEN. DOHERTY** moved that **SB 320 BE AMENDED - AMENDMENTS 4 & 7.**

Discussion:

SEN. DOHERTY related that the distinction is whether this occurs during the crime or during the accident. The arguments are the same.

SEN. HOLDEN remarked that this involved someone who breaks into a home or business to commit a felon and ends up blaming the homeowner or business person for his or her injury. The money source is the homeowner or business insurance policy.

SEN. DOHERTY maintained that this gets back to limited damages in one hand and granting the insurance company immunity on the other hand.

Vote: **The motion failed on roll call vote - 4-5.**

Motion: **SEN. DOHERTY** moved that **SB 320 BE AMENDED - AMENDMENT 8.**

Discussion:

SEN. DOHERTY related that this simply requires that there be a conviction. This excises the language on page 3, line 4, and would include the first sentence in (3).

SEN. HOLDEN asked that the Committee accept the amendments.

Vote: **The motion carried unanimously - 9-0.**

Motion/Vote: **SEN. HOLDEN** moved that **SB 320 DO PASS AS AMENDED. The motion carried on roll vote 6-3.**

SENATORS HALLIGAN and **BISHOP** were excused from the meeting.

{Tape : 1; Side : B; Approx. Time Counter : 8.45}

EXECUTIVE ACTION ON SB 328

Ms. Lane explained that amendments SB032802.avl, **EXHIBIT(jus38a02)**, would change the bill so that all that was left was a prohibition against discrimination in employment based on sexual orientation. This leaves Sections 1, 3, 11 and 18 in the bill.

Motion: **SEN. DOHERTY** moved that **SB 328 BE AMENDED.**

Discussion:

SEN. DOHERTY commented that the amendments are in response to the question of prohibiting discrimination based on sexual orientation. The question is clear. Should someone be able to discriminate in employment situations on the basis of sexual orientation. This is a reasonable step to make sure that all persons are not faced with discrimination in the workplace on the basis of sexual orientation.

Vote: **The motion carried unanimously - 7-0.**

Motion: **SEN. DOHERTY** moved that **SB 328 DO PASS AS AMENDED.**

Discussion:

SEN. GRIMES conveyed that the bill would attempt to prevent discrimination based on sexual orientation for purposes of employment. Montanans have a sense of deep fairness and respect for people who are good employees. There are significant

economic incentives to hire the right person for the job. The sexual orientation language would give poor workers a license to go to court on a self-defined minority status. He does not want to condone heterosexual dysfunction or homosexual dysfunction in the workplace. There are individuals from both groups that we don't want to be associated with in relation to the workplace.

He raised a concern that a preference was not injected into the law for something that people have the ability to control. Persons may take the opportunity to call themselves homosexuals for the express reason of obtaining a certain job. This could open the door for a lot of mischief. Bizarre behavior would create problems in the workplace.

He suggested that the word "sexual orientation" should be changed to "homosexual behavior". The definition section would need to be stricken entirely.

Substitute Motion: **SEN. GRIMES** moved that **SB 328 BE AMENDED BY CHANGING THE WORDS "SEXUAL ORIENTATION" TO "HOMOSEXUAL BEHAVIOR". THE DEFINITION SECTION WOULD NEED TO BE STRICKEN IN ITS ENTIRETY.**

Discussion:

CHAIRMAN GROSFIELD summarized that this would strike Sections 1 and 18. In Section 3 the term "sexual orientation" would be changed to "homosexual behavior".

SEN. DOHERTY opposed the amendment. He remarked that it is good to use terms that have some definition and use. Twenty three states have used the words "sexual orientation". "Homosexual behavior" would be a new term and he would not know the meaning of the term. "Sexual orientation" was defined in the bill as either homosexual or heterosexual. Homosexual behavior would limit the application in the situation of a gay or lesbian supervisor who didn't like a person's flagrant heterosexuality and fired that person for that reason. There would be no recourse.

SEN. HOLDEN insisted that the bill was designed so that there would not be discrimination against homosexuals in the workplace. This doesn't speak to sexual preference, sexual orientation, or heterosexual flagrant behavior. This bill addresses the homosexual agenda being pushed on mainstream Montana.

SEN. MCNUTT agreed. All the testimony was centered around homosexuality. No one debated heterosexuality in relation to the bill.

SENATORS HALLIGAN and **BISHOP** returned to the meeting.

SEN. BARTLETT asked **SEN. GRIMES** for a definition of homosexual behavior in the context of the bill. **SEN. GRIMES** remarked that by including sexual orientation or homosexuality in the law, there will be problems occurring in the workplace in regard to behavior. He remarked that in the states where the law has been in effect for less than a year, there haven't been a lot of court cases but it appears to have caused a great deal of problems for certain employers. Homosexual behavior could be anything an employee construes it to be if they want to get back at an employer. We don't know the net effect of including this language in the law.

SEN. BARTLETT did not see the point of putting a term into the law that the sponsor of the proposal could not define. She saw a difference between his inability to define the term and his final claim that since we don't know what it is and he can't describe it for us, nonetheless, it would create real problems in the workplace. This is not a constructive amendment since it will cloud the issue due to the fact that the term cannot be defined.

SEN. HALLIGAN insisted that there was a huge difference between the fact that someone is gay and lesbian and someone firing that person because he or she is gay or lesbian. Same sex kissing, touching, or sexual contact in the workplace is totally inappropriate and was not proposed to be allowed. Heterosexual behavior of the same kind would be grounds for firing a person. The assumption is that this is attempting to protect homosexual behavior. This should not be taking place in the workplace anyway. All that this says is that a person should not be fired because he or she is gay or lesbian. Any inappropriate behavior would be sanctioned.

SEN. DOHERTY maintained that by adding sexual orientation to the classes of prohibited conduct, this states that if a gay or heterosexual person objects to a hostile work environment and is fired for objecting to this situation, this person would be protected under the bill. The proof problem would be the same as a case in which someone maintains they were fired because they are Catholic. He hasn't seen an explosion in these types of cases based on religion.

SEN. GRIMES remarked that it is not appropriate to include a behavior in a list because it will give a license for mischief. A former gay testified to this Committee in a previous session that homosexuality is a reversible condition.

Substitute Motion: **SEN. GRIMES** moved to **TABLE SB 328.**

Discussion:

SEN. HALLIGAN stressed that positive steps have been taken to focus the bill on employment, which includes the major concerns. Why would we want to table this bill? This is simply equal treatment in the workplace.

SEN. DOHERTY pointed out that, for purposes of this bill, it doesn't matter whether this is an inherited trait or whether a person can be cured or not cured. This bill addresses a person's attempt to gain and keep employment and what grounds are legitimate grounds for that person to be fired from his or her employment. Whether a person is homosexual or heterosexual is a fundamental matter of civil rights.

SEN. BARTLETT related that it is striking how similar today's arguments against the intent of this bill are to the arguments made against including blacks in the Civil Rights Act of 1964. The arguments center around being faced with a change and the unknown outcome. Human beings inherently react by assuming the worst possible outcome. Just as we have not have had the worst possible outcome in relation to blacks or women in the workplace, we would not have the worst possible outcome in relation to homosexuals in the workplace and providing protections against adverse actions toward those people based solely on that characteristic rather than on legitimate job-related reasons.

CHAIRMAN GROSFIELD suspended executive action on SB 328 until the completion of the hearings scheduled for this day.

HEARING ON SB 435

Sponsor: **SEN. MIGNON WATERMAN, SD 26, Helena**

Proponents: **John Oitzinger, State Bar Association**
Daniel J. Whyte, Chief Legal Counsel, Secretary of State's Office
Thomas C. Morrison, Tax Attorney

Opponents: **None**

Opening Statement by Sponsor:

SEN. MIGNON WATERMAN, SD 26, Helena, introduced SB 435. She explained that she carried the limited liability act several years ago which allowed a beneficial form of incorporation for small businesses and farms in Montana. This bill includes revisions to that act which will help meet the uniform state and federal laws. The business community is now multi-state, multi-

national, and global. The revisions will remove some of the current restrictions which protected partnerships in state and federal statutes. Some of the federal income tax regulations have been removed and this protection is no longer necessary.

{Tape : 2; Side : A; Approx. Time Counter : 9.15}

Proponents' Testimony:

John Oitzinger, State Bar Association, rose in support of SB 435. He presented his written testimony, **EXHIBIT(jus38a03).**

Daniel J. Whyte, Chief Legal Counsel, Secretary of State's Office, explained that annual reports that limited liability companies must file with his office to indicate that they are still in business and who is running the business, have been revised to meet the same requirements as corporations.

Thomas C. Morrison, Tax Attorney, remarked that a small oil company in Wyoming started a limited liability company in the early 1980s. Only two states had limited liability companies until 1986 when the tax law changed that eliminated favorable tax treatment provided for corporations when liquidating. This caused a nightmare for those doing business in S-Corporations. Every state now has limited liability company acts. Initially Montana allowed one person limited liability companies. The limited liability company had parity with the S-Corporation. Two years ago the IRS decided to let one person limited liability companies be taxed as Schedule C, non-corporate businesses.

Montana is now at a new threshold. The missing provision is that in estate planning, families cannot rig discounts to create minority interests in businesses that have lower values because they have contracted among themselves to make their business interests less valuable. The IRS does not impair the impediments that state law imposes on a business arrangement. Under the new act, a Montana rancher with a $5 million ranch is faced with at least $2.5 million in estate taxes. With shrewd estate planning under this legislation, a Montana rancher can place his ranch in a limited liability company and create a 49% interest for dad, a 49% for mom, and a 2% interest for junior and his sister. The 49% interests are not majority interests. Using this legislation, the IRS will have to respect that any person who owns an interest in that limited liability company will not have a controlling interest. The IRS will oftentimes give 50% to 60% discounts. If dad owns a 49% interest in a $5 million ranch, normally this would be $2.5 million but with a 50% to 60%

discount his interest in the ranch may only be $1 million. This is a mechanism where the family ranch can pass down to the next generation with a minimum of hurt. This is a privilege that other taxpayers in other states are enjoying.

He requested that the bill have an immediate effective date. There is no reason why this very helpful law should not be used as soon as possible.

{Tape : 2; Side : A; Approx. Time Counter : 9.27}

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. GRIMES recalled that when this legislation was introduced in 1993 a University of Montana professor was involved in the drafting of the legislation. He questioned whether he was involved with this legislation.

SEN. WATERMAN expressed regret that he is no longer in Montana. She added that he is the Dean of the Ohio Law School. The Law School has been involved in drafting the amendments.

SEN. HALLIGAN asked for a comparison between the Subchapter S-Corporation and the limited liability partnership. **Mr. Morrison** explained that the Subchapter S Corporation is more complicated and has a superficial simplicity. The tax free flow through from a Subchapter S Corporation can happen generally at the income earning level but this becomes a lobster trap. It is easy to put property in an S-Corporation. It is a nightmare to get the property out. If the purchase price of a ranch is $500,000 and it appreciates to $5 million inside an S-Corporation, to remove the corporate shell, there would be a $4.5 million gain which needs to pass to the shareholders. This does not happen in a limited liability company. This was the key change in the 1986 tax act. It scared everyone away from S-Corporations and triggered the huge build up of limited liability companies.

If you are in a limited liability company and it is an active business, your earnings are treated as active earnings for social security purposes. In the S-Corporation, the dividends that pass out are not taxed as active earnings.

Both plans offer limited liability. If you own your own business and are personally involved with a accident, you are personally liable as well as the business. If the employee or someone in the business causes an injury, the business is exposed and not the owner.

CHAIRMAN GROSFIELD remarked that the 50% discount would address federal taxes. **Mr. Morrison** stated that there are two interests. One is in the will and one is at term. The term limit of the liability company is very limited. The marketability of your business is quite limited. The federal government respects state legislature actions. The state legislature can impose impediments on the form of organization but the family members cannot rearrange the plan.

CHAIRMAN GROSFIELD questioned whether the legislation had been modified to serve Montana. **Mr. Oitzinger** remarked that he agreed with changing the effective date as mentioned earlier. There is very little in the legislation that would be troublesome to an existing entity. The bill contains certain features of Montana law. In particular, the requirements for a written operating agreement were included. Greater definition of fiduciary duties are also included. The bill is available on the Internet and practitioners are aware of its contents.

Closing by Sponsor:

SEN. WATERMAN also did not have a problem with an immediate effective date. This bill will help small Montana companies and brings us into compliance with the uniform act.

{Tape : 2; Side : A; Approx. Time Counter : 9.38}

HEARING ON SB 463

Sponsor: **SEN. JACK WELLS, SD 14, Bozeman**

Proponents: **REP. BILL TASH, HD 34, Dillon**
Chad Massard, Small Business Owner

Opponents: **None**

Opening Statement by Sponsor:

SEN. JACK WELLS, SD 14, Bozeman, introduced SB 463. In 1997, he carried HB 534 which changed the law to establish fairness between independent contractors and state agencies, particularly the Department of Transportation. The department maintains that the law should only be used in contracts that had gone into effect after the law was established. That was not the intent of the legislature at the time the law was passed. The intent was that the state would be liable for interest and attorney fees in court cases where they lost to a contractor. After the governor mandatorily vetoed it, the amendments were rejected and it was returned to the governor in its original form and was signed.

The bill and the law should apply to contracts that were in effect at the time the bill was passed as well as any contract cases under litigation at the time. If the cases in court were not included in the law, this would automatically divide contractors into two different classes: those capable of recovering costs after the law was passed and those who would not be able to recover costs even though their cases were in court at the time.

The governor's amendment proposed that the bill be effective only for contracts to be let after the bill was passed. These amendments were rejected.

{Tape : 2; Side : A; Approx. Time Counter : 9.43}

Proponents' Testimony:

REP. BILL TASH, HD 34, Dillon, remarked that a constituent of his who is a contractor, finds it necessary to file legal action against the state for a contract that was violated. The burden of proof is quite heavy. This bill involves very important and necessary changes.

Chad Massard, Small Business Owner, explained that he has worked for his family ranch and other contractors. It is important that businesses are protected from financial damages. The state is well protected but Montanans who enter into contracts with the state need protections. In the future, compensatory damages should be awarded if the state prolongs cases by stonewalling and dragging a case out for years. They have been trying to settle this dispute from day one and now that it is a year and two months later, they are finally reaching the people in the state who are negotiating to keep this case out of court. It may take two years to get this case to court and win a dispute. Small businesses need every penny they can get their hands on to survive. The state has the capacity to last through the court case. This bill levels the playing field to protect small businesses. The heads of the department need to start addressing these issues in the field. He added that future legislation should make the state more responsible for their actions. They may have the power to outlast small companies and watch them dissolve, but this doesn't make it right or fair.

Opponents' Testimony: None.

{Tape : 2; Side : A; Approx. Time Counter : 9.50}

Questions from Committee Members and Responses:

SEN. DOHERTY conveyed that normally in contracts one item that is usually negotiated is whether a breach of the contract would subject the breaching party to attorneys fees and costs. If attorneys fees are to be paid by the state in a contract action and the individual loses, they may be liable for the state's attorneys fees as well. **SEN. WELLS** remarked that this was discussed at length in HB 534. This should be written in the contract so that both sides are fully aware of the circumstances when the contract is let.

SEN. DOHERTY remarked that this gets to the issue of retroactivity. This would result in writing a retroactive statement into existing contracts stating the responsibilities for attorneys fees. There is a constitutional prohibition against tinkering with contracts. **SEN. WELLS** stated that when the bill was signed into law, it was applied to contracts that were in existence at that time or court cases that were being litigated at that time. The application of the present bill is only meant to apply to those cases and nothing before that. Since there wasn't a constitutional problem with HB 534, SB 463 should not have any further constitutional problems because it is being applied to the law as was written in 1997.

SEN. DOHERTY questioned how many contracts would be involved as well as the potential liability to which the state would be exposed. **SEN. WELLS** responded that he has not asked the administration this question. They did not have specifics last session so their arguments didn't hold. He noted that the state has paid some bills.

Closing by Sponsor:

SEN. WELLS concluded that this bill will help small businesses in Montana. Last session he told the governor that he believed the bill would encourage the state to do a better job of contracting. This also gives the state the incentive to settle court cases on a quicker and more timely basis.

{Tape : 2; Side : B; Approx. Time Counter : 10.07}

HEARING ON SB 461

Sponsor: **SEN. BILL GLASER, SD 8, Huntley**

Proponents: **Kae McCloy, Landowner**
Clint McRay, Rancher

Opponents: **Leo Berry, Yellowstone Pipeline**
Florence Murphy, Express Pipeline

Gail Abercrombie, Montana Petroleum Association
Jon Alke, Montana Dakota Utilities, Williston Basin Interstate Pipeline and Northern Border Pipeline
John Augustine, Conoco
Mick Gee, Cenex Pipeline
Georff Feiss, Montana Telecommunications
Barbara Ranf, US West
Jay Waterman, Montana Power Company
Mike Strand, Independent Telecommunication
Don Allen, Western Environmental Trade Association

Opening Statement by Sponsor:

SEN. BILL GLASER, SD 8, Huntley, remarked that there are five bills this session that address eminent domain. He has been here since 1985 and does not remember any eminent domain bills. Four of the bills are carried by Republicans. One of the bills is carried by a Democrat.

In earlier times, eminent domain was important for opening new territory and providing services. Times have changed and it is important to rethink eminent domain laws. If someone puts in a needed service, this service is provided as a common carrier, which means they carry for everyone. When someone else sees the profits made, they believe they should have eminent domain as well. What about property rights?

His family has a 250,000 volt Montana Power Company line on their property. When more power was needed in the Huntley Project, the REAs told his family they needed a place for a substation and a spur line off the 250,000 volt line. They didn't want it but came to the conclusion that the people at the Huntley Project needed a second source of power. They saw this as a public necessity and gave an access.

Kae McCloy and her family only wanted their water protected and the pipeline out of their field. The pipeline company had their own idea. This bill states that the first person providing a common carrier service has the right of condemnation because there is a public need and necessity. The second pipeline or the second telephone line is for competitive reasons and serves no public interest purpose. There is a competitive interest, a corporate interest, and/or a capitalistic interest.

When a deal is cut to put in a pipeline or phone line, etc., and then later a deal is cut with another entity for perhaps a fiber

optics line, the original owner of the property who should have been benefitting from the use of their land, is left out.

The **McCloy** contract which Cenex provided stated that all of the ranch was being condemned, the pipeline would go where the company chose to place it, and following this action papers would be drawn up explaining where the pipeline was placed. **Ms. McCloy** did not want the pipeline to go through the bottom of the creek. Cenex had already decided that they couldn't use her neighbor's land because he was an officer at First Interstate Bank in Hardin and had told Cenex they could not use his land and if they tried he would fight them the entire way. The pipeline went through Lost Boy Creek, which is the primary water for the **McCloy Ranch**. This is a second pipeline and thus the old easement could be used. This bill forces existing pipelines to stay in their existing easement or pay a reasonable price for the cost of a new easement. Corporate lawyers will tell you that they do all this. If they are such a perfect corporate citizen, why are there five bills in this session to change the eminent domain laws? Why are four of these bills carried by people that represent the capitalistic portion of our society?

Proponents' Testimony:

Kae McCloy, **Landowner**, explained that her land was condemned for a replacement pipeline. When the Cenex representative brought an easement to her, he stated he was in a hurry and needed it signed in two days. The easement covered their entire ranch to include ten sections. The depth of the line was up to Cenex's discretion and could be left above ground. When the surveyor arrived, they asked him to go down the south boundary of their land because it was farthest from the water and it was close to the fence, which would keep fire equipment from digging into the line. The surveyor stated that that route would be okay, but he wanted to stake this in the open land which went right through the springs and very close to Lost Boy. He explained that this would be more convenient for Cenex. They told them they would need more money because this would ruin the only water in one full section and they would need to drill a new well or replace the springs. The surveyor agreed that this would be no problem. Once it was staked, negotiations were over.

They told Cenex they would be willing to take the $50,000 they offered for three miles of line if they went down the fence or $200,000 if they went where the property had been staked. They filed condemnation. Eminent domain is for the most public good for the least private injury. They have learned that fiberoptic cable has been included. The fiberoptic entity told them that they normally offer $40,000 per mile, lump sum payment, or $5,000

a mile per year. The price they asked was not unreasonable for three miles. The fiber optics company has told them that if the easement does not say telemetering or an integral part of the pipeline, it is installed for commercial use. They have been told that it was pre-sold to Touch America. Their ranch water and ranch operation should not be ruined for a replacement line and a lucrative fiberoptic line for Cenex. The law should not allow such abuse.

Clint McRay, Rancher, stated that if there is an existing right-of-way and another utility wants to build a fiber optics line, a pipeline, etc., the entity should stay within the existing right-of-way. This is only fair. If there is a ranch where a right-of-way does not exist, the landowner needs to have a lot of negotiating power deciding where the line should go. This is only fair. Landowners are not very familiar with the process and are at a disadvantage when it comes to negotiating with these large companies.

{Tape : 2; Side : B; Approx. Time Counter : 10.25}

Opponents' Testimony:

Leo Berry, Yellowstone Pipeline, explained that the ramifications of this bill are very broad. This is a major policy position. He referred to page 2, section 2, of the bill and stated that in (a) the bill prohibits parallel easements for a wide variety of services. This would mean that if a telephone line of above ground wires were on the land, eminent domain could not be used to place fiber optics in the same right-of-way or parallel right-of-way. This is contrary to public policy and probably contrary to the intent of the sponsor. If there is a good route that makes sense for utilities, other utilities should not be prohibited from being parallel with that existing utility.

The bill also has a provision regarding similar services. This would prohibit a natural gas pipeline from accessing a community that is already being served for that particular service. If someone wanted to build telephone lines into a community, this bill could require the entity to loop all the way around the community or take an alternate route that may not be the best route. This is not in the public interest.

Many of the pipelines are old and need to be replaced over a period of years. A pipeline may need to be moved away from an environmentally sensitive area. This bill would prohibit the use of eminent domain to run a pipeline parallel to an existing pipeline. This bill applies to communities who may want to get into the provision of electrical services and could limit the

community's ability to use condemnation to provide that service via an alternate route.

Subsection (b) is unneeded. Before a petition can be filed with the court, it must be demonstrated that a written offer has been made to acquire the property voluntarily. At least fair market value must be offered for the easement. The court is authorized to grant an easement but it needs to be the least intrusive property interest to all the project to go forward. He raised a particular concern regarding the last sentence of the bill which stated that there is no power of eminent domain for the additional pipeline or other systems. This is a very broad prohibition. There could be a pipeline in place which is the best place to run another utility, but since there is a system already in place the use of eminent domain may be prohibited. The result of this bill could be to have utility corridors running all around the state rather than along the best routes that make the most sense.

Florence Murphy, Express Pipeline, related that Express Pipeline was constructed in 1996. This is a 785 mile, 24 inch in diameter, crude oil pipeline with 305 miles in Montana. The $380 million project received approval from several federal and state authorities following an environmental impact process. The pipeline route was selected to avoid, mitigate, and minimize environmental impacts. The route recognized landowners requests for special attention on their property. In the 305 miles in Montana, there were approximately 500 tracts of land involving approximately 425 landowners. This included tenants on state and federal lands. Senate Bill 461 suggests a practice contrary to that encouraged in other areas of the country. Utilities have been encouraged by federal and local regulators to work within corridors. Parallel systems are encouraged to minimize the impacts and inconvenience to landowners.

Gail Abercrombie, Montana Petroleum Association, conveyed that the bill is a monopoly guarantee. It does not provide for expansion in service. The reason there are eminent domain laws this session is because the pipelines are aging and need to be replaced and possibly moved from wetland areas to better areas. Page 4, line 14, of the bill talks about taking of the property. In pipeline cases, this is an easement and not taking of a property. The pipeline is laid underneath subsurface. The pipeline does not become owner of the property.

{Tape : 2; Side : B; Approx. Time Counter : 10.37}

Jon Alke, Montana Dakota Utilities, Williston Basin Interstate Pipeline and Northern Border Pipeline, remarked that there is a

theory that once a utility corridor is identified, all subsequent installation should follow that corridor. This minimizes the impact to the landowners. He referred to page 2, lines 17-19 of the bill. This states that someone trying to build a parallel system would have no power of eminent domain. Two lines above this states that construction can only take place if the consent of the landowner is received and the payment demanded by the owner. The landowner could state that he wanted $1 billion for a l00 foot easement. If the entity did not want to pay $1 billion, this bill states there is no right of eminent domain.

{Tape : 3; Side : A; Approx. Time Counter : 10.39}

John Augustine, Conoco, rose in opposition to the bill. He specified that they have a problem with section 2 on page 2. Regarding parallel routing, he knows of two pipelines that have been in place side-by-side for many years. This is the most environmentally sensitive way to provide for a pipeline. This bill is the result of a single case of a landowner having a problem with a pipeline company.

Mick Gee, Cenex Pipeline, related that regarding their involvement in the condemnation proceeding referred to earlier, there are many aspects to this case. Cenex entered into this proceeding only as a last resort effort. This bill would effectively create a monopoly for the first installer of any utility through an area. If there is a crude oil pipeline in place, is a products pipeline prohibited? If there is a propane pipeline in place, is a natural gas pipeline prohibited? If there is a 40 year old telephone line in place, is a new fiberoptic line prohibited? Current eminent domain laws include the right to install a communications line along with the pipeline for use only in connection with the operation of the pipeline. This allows for use of video monitoring at remote, unattended pipeline facilities. The last two sentences of the bill would stop any planned activity if there is an existing easement across the property.

Georff Feiss, Montana Telecommunications Association, rose in opposition to SB 461. The power of eminent domain is very rarely used. This bill may actually cause a land rush and promote the grab of eminent domain through condemnation because of the provision of creating a monopoly over the first come first serve use of rights-of-way. The Federal Telecommunications Act of l996 preempts states' ability to erect barriers to entry. The entity that would have the first right-of-way and the ability to exclude any parallel or shared use of the rights-of-way, would have a barrier to entry. This would exclude competition which would result in increased rates and less investment.

Barbara Ranf, US West, reiterated this bill's conflict with the Federal Telecommunications Act of 1996. This Act requires full and open competition in the telecommunications industry. It prohibits states from maintaining or erecting barriers to full and open competition in telecommunications. This would require US West, as one of the baby bells, to provide access to their poles, conduit, and right-of-way to all of their competitors.

Jay Waterman, Montana Power Company, explained that MPC Gas Transmission Services Department is responsible for the design, siting, construction, operation and maintenance of over 2,100 miles of natural gas transmission line in Montana. These lines, along with the association distribution lines, serve over 145,000 residential, commercial and industrial customers. This bill would prevent efficient utilization and expansion of their existing natural gas pipeline infrastructure. The pipeline system that serves western Montana is running out of capacity. Recently they completed two projects which added needed capacity in both Missoula and the Flathead Valleys. Both of these projects used the technique called "looping". Looping an existing pipeline means laying a second pipeline in the same general utility corridor as the first line. This requires that the upstream end of the new pipeline be tied in with the downstream end of the new pipeline. Looping is a very common and cost effective way of increasing pipeline system capacity.

Pipeline routing evaluation must include safety, environmental impact, impact to the general public, intrusion upon landowners, use of existing utility right-of-ways and corridors, roadway, railroad, and river crossings, access for operation and maintenance and cost. Under many circumstances these criteria come into direct violation with one another and must be balanced for the greater public good. Many regulating bodies, including the Montana Facility Siting Bureau and the Federal Energy Regulatory Commission, employ guidelines which incur siting new pipelines where they can utilize existing pipeline right-of-ways and transportation corridors.

Mike Strand, Independent Telecommunication Systems, remarked that this bill is too restrictive by restricting to the first provider or first easement holder. They would be held hostage in any competitive situation. The first provider could indicate that there is no capacity on their existing lines or that they are reserving that capacity for future use and thereby prevent competition. They have been mandated by federal law to compete in the telecommunications industry.

Don Allen, Western Environmental Trade Association, related that the concerns of major policy change have been well outlined.

This bill would provide another roadblock to commerce in this state. All the environmental safeguards are contained in other laws.

{Tape : 3; Side : A; Approx. Time Counter : 10.54}

Questions from Committee Members and Responses:

SEN. HALLIGAN asked for further clarification of the scope of eminent domain. **Mr. Berry** explained that the court is authorized to grant the least intrusive property interest that is necessary for the construction of the project. In the instance of construction of a pipeline, the court needs to make a finding that the property is needed for the construction of the project. That finding is that the property is necessary for the construction of a pipeline. The court is not making a finding that it is necessary for a telegraph line, a telephone line, a natural gas line, or any other utility through the corridor.

Some projects have environmental impact statements that cover the entire route of the line. Smaller projects may not be covered by a comprehensive EIS. The judge considers this in determining the need but would not substitute its judgment for that of the permitting agency.

SEN. HALLIGAN asked the sponsor if he agreed that this bill could grant a monopoly. **SEN. GLASER** remarked that the bill does not prevent entities from putting in lines. It states that if a second line is constructed, it needs to be done without the state's police powers.

SEN. DOHERTY remarked this his understanding of the bill is that once eminent domain is granted, it tends to attract the other entities. It does make sense to combine these services. The bill states that for each of those additional projects the landowner needs to be included. **SEN. GLASER** explained that if this is disclosed up front, a deal is cut with the landowner and if condemnation is involved, the court system then knows the uses that will be involved. It is not proper for someone to say they are putting in a telephone line and then six months later use the same easement, without the landowner's knowledge or compensation, for another service.

SEN. DOHERTY suggested an amendment that would allow the landowner to obtain a reasonable amount for the easement. Courts are in the habit of determining the amount that might be reasonable compensation. If eminent domain were not allowed, the court could still determine a reasonable amount for the additional easement. **Mr. Alke** maintained that the bill states

that there is no power of eminent domain for the second corridor. Section 2(a) states that there is no other utility corridor but the first corridor.

SEN. DOHERTY maintained that the issue at hand is for the person attempting to condemn the land to offer a reasonable amount to the landowner.

SEN. JABS asked for more clarification of the conflict with federal law. **SEN. GLASER** remarked that there are hundreds of telephone companies. Common carriers are supposed to be providing access. Most of the fiberoptic lines running across this state do not even serve Montana. It is time to rethink how eminent domain is handled.

SEN. JABS questioned why a parallel route was not allowed. **SEN. GLASER** explained that they do not want to keep Express Pipeline from serving Casper, Wyoming simply because the pipeline goes through Laurel.

CHAIRMAN GROSFIELD conveyed that this bill amends statutes in Title 69 and Title 70. There isn't much guidance for negotiations between landowners and an entity seeking an easement. He questioned if the process was guided by case law. **Mr. Alke** clarified that most acquisitions for right-of-way are negotiated and a very small percentage is handled by eminent domain. Pipelines generally seek an easement to construct and maintain. On agricultural ground, it is common that the landowner may say that he doesn't want the entity in his fields during planting and harvest. The pipeline needs to handle the construction after the crops are taken. These sorts of things are handled through negotiations. If this goes to court, the landowner is still able to raise all these issues. When an entity has land condemned, it not only pays for the land that is taken but also any damages to the remainder. This would include the spring in **Ms. McCloy's** case. The basic eminent domain proceeding is in statute but there is an enormous amount of case law interpreting the statutes.

{Tape : 3; Side : A; Approx. Time Counter : 11.10}

Mr. Berry added that Montana has adopted the Major Facility Siting Act. When projects are over a certain size, they become subject to this Act. This involves the siting and actual routing of a facility and public input is involved in this process.

CHAIRMAN GROSFIELD remarked that it is his understanding that easements are restricted to the purpose for which they are sought, but in practice this isn't always the case. He is aware

of some cases that involve railroad easements and fiber optics. The question is whether the fiber optics company should be paying the railroad or the underlying landowner.

Mr. Alke responded that the majority of right-of-way is acquired on a negotiated basis and is not an eminent domain proceeding. If the railroad right-of-way was obtained 80 years ago and they negotiated with the current landowner's predecessor-in-interest a fee simple, they would be entitled to allow others to use the railroad right-of-way because they own it. His clients are only interested in easements to lay a pipe underground. They don't care about controlling the surface. When negotiating an easement to place and maintain a pipeline, if the landowner stipulates that he doesn't want anything but a pipeline in this easement, this is put in the agreement.

Mr. Berry agreed that the document would determine the rights of the parties. If an easement is acquired for a single purpose, any additional utility through that corridor without the permission of the landowner, would be suspect.

CHAIRMAN GROSFIELD asked **Mrs. McCloy** whether she received compensation for the loss of her spring. **Mrs. McCloy** explained that they have been through district court and the Supreme Court. The decision was handed down in December. The pipeline is not in at this time. Her understanding is that the next part of the process will be for the three person commission to meet and discuss the compensation. The commission is appointed by the district judge that presided over their case. He sets the rules and approves the appointments. If either side disagrees with the appointments, there is an appeal to a jury which will set the commission. She believes the compensation will be based on the rod amount rather than the damages.

SEN. DOHERTY questioned whether the Cenex Pipeline was covered by the Major Facility Siting Act. **Mr. Berry** did not believe that it was.

SEN. DOHERTY questioned whether railroads would be covered by the Major Facility Siting Act. **Mr. Berry** affirmed that they were not. He added that there are a number of other permits that need to be approved by regulatory bodies. This includes a 310 permit, an air quality permit, water quality permit, etc. These will contain some element of environmental review and siting issues would also be involved.

SEN. DOHERTY inquired whether the projects not covered by the Major Facility Siting Act would include any prohibition against a company using eminent domain prior to the time that the

environmental analysis is completed. **Mr. Berry** explained that there is no prohibition against commencing the condemnation proceedings but as part of the proceedings you must demonstrate to the court that the property interest is needed. If the permits had not yet been issued, a court would be hard pressed to agree that the land was needed at that time.

SEN. HOLDEN remarked that his reading of page 2, lines 9-12, 2(a) was different from that of **Mr. Alke.** His understanding is that the power of eminent domain may not be exercised. He believed that the intent was to use parallel easements when this is the best way to handle the matter. He believed that an amendment could be added that the landowner needs to be paid for this. In 1999, we have served most of the areas in this state and across the nation. There is merit in developing a public policy regarding crossing private property and infringing on private property rights. Is it for competition or public necessity?

Mr. Alke agreed that lines 9-12, page 2 was a prohibition.

{Tape : 3; Side : B; Approx. Time Counter : 11.20}

He continued that the language states a parallel strip cannot be condemned. This can only be accomplished under 2(b) which states an entity such as Montana Dakota Utilities (MDU) could place a pipeline in an entity such as Montana Power Company's (MPC) power transmission corridor but Montana Power Company cannot grant this authority. The landowner has this authority and will set the price. If MDU did not like the landowner's price, he would have no other choices because the power of eminent domain had been repealed.

SEN. HOLDEN claimed that a power line and a pipeline were two different things to him. **Mr. Alke** believed that the language "same item" would be a utility corridor.

CHAIRMAN GROSFIELD asked how a company would decide to go ahead with condemnation. **Mr. Gee** insisted that many contacts are made with the landowner to attempt negotiating an acceptable easement. In the case discussed today, Cenex could not reach an agreement as to the compensation. The condemnation proceeding was a last resort measure. They started to buy pipeline right-of-way for this project approximately two and one half years ago. They negotiated with the **McCloys** for six to nine months before filing condemnation proceedings against them. The filing was one and a half years ago. The legal proceedings have concluded and they are now headed to the compensation portion of the condemnation proceeding.

Closing by Sponsor:

SEN. GLASER summarized that a landowner as a good state citizen should be willing to contribute by allowing the public to intrude on his land for public need. This should happen once but not again and again. When Cenex decided to condemn the **McCloy** property, they believed they would be treated better by the court system. The district court issued an order that increased upon Cenex's demand. It widened the easement and included communications fiber optics in the condemnation. The Supreme Court also denied their concerns. This bill is about fairness to property owners and deals with prudent delegation and use of our police powers. Common carriers should be able to supply other carriers. Does everyone need a separate line? The bill contains language that states "roughly parallel to the route of the existing pipeline or other system already conducting the same item."

{Tape : 3; Side : B; Approx. Time Counter : 11.35}

EXECUTIVE ACTION ON SB 328

Motion: SEN. GRIMES moved that **SB 328 BE TABLED.**

Discussion:

SEN. HALLIGAN claimed that no one wanted to sanction inappropriate behavior in a workplace. Why table the bill when the issues in employment discrimination could be addressed? This would be a clean way of handling the issue.

SEN. GRIMES contended that the issue is not clear. Both Washington and Maine had public efforts to overturn this legislation. These efforts were successful. Information regarding the Maine situation states that specific government recognition of a behavior is confusing and legitimately raises much larger questions about fairness.

CHAIRMAN GROSFIELD added that this would place some small employers in a very difficult situation. A business that hires one or two people would be in the position of having to hire someone who will cause the business to lose clientele. The bill could speak to state government or employers with a set number of employees. He appreciates the behavior issue that was addressed earlier. In a behavior issue there is some element of choice. Civil rights for a matter of choice is a different issue.

SEN. DOHERTY insisted that we already have civil rights for a matter of choice. A person cannot be fired because of their

religion. It doesn't matter if you are an employer with one employee or 10,000 employees. A person is far more likely to know someone's religion than they are to know someone's sexual orientation. He offered a suggestion that an amendment be added where this would only apply to state government.

CHAIRMAN GROSFIELD claimed that there was a very big difference between choice regarding religion and choice regarding sexual orientation. That difference is a federal and state constitutional recognition of equal protection for those purposes. When researching the minutes from the Constitutional Convention, he could not find any mention of the topic of homosexuality.

SEN. HOLDEN stated religion is the reason why homosexuality is not accepted in mainstream Montana. Religion involves our roots. He further remarked that it is not proper to view these two issues together. His family came to the United States for freedom of religion in 1634. They fought in every war to keep this country free. There is no mention that anyone in his family came to this country to establish freedom for rights of homosexuality. The majority of people still believe that the practice of homosexuality is a sin.

Vote: Motion **carried 5-4 with BARTLETT, BISHOP, DOHERTY, and HALLIGAN voting no.**

SEN. DOHERTY was excused from the meeting.

EXECUTIVE ACTION ON SB 404

Motion: **SEN. MCNUTT** moved that **SB 404 BE AMENDED.**

Discussion:

SEN. MCNUTT explained the amendments, SB040401.avl - **EXHIBIT(jus38a04).** There was concern that if a judgment was filed, people may be able to shelter funds in an IRA. The amendments state that anything made before the suit resulting in judgment was filed would be judgment proof. After that, it would not be judgment proof.

Vote: Motion **carried unanimously - 8-0.**

Motion/Vote: **SEN. MCNUTT** moved that **SB 404 DO PASS AS AMENDED. Motion carried unanimously -8-0.**

EXECUTIVE ACTION ON SB 435

Motion: **SEN. HALLIGAN** moved that **SB 435 BE AMENDED.**

Discussion:

SEN. HALLIGAN explained that the amendment would include an immediate effective date on the bill.

Vote: Motion **carried unanimously - 8-0.**

Motion/Vote: **SEN. HALLIGAN** moved that **SB 435 DO PASS AS AMENDED. Motion carried unanimously -8-0.**

ADJOURNMENT

Adjournment: 11:55 P.M.

_____
SEN. LORENTS GROSFIELD, Chairman

_____
JUDY KEINTZ, Secretary

LG/JK

EXHIBIT(jus38aad)