MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 18, 2003 at 8:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

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 & Date Posted: SB 398, 2/14/2003; HJ 1, 2/12/2003; SB 394, 2/14/2003; SB 397, 2/14/2003;

Executive Action: SJR10, SB 285, SB 398, SB 37

HEARING ON SB 398

Sponsor: SEN. BRENT CROMLEY, SD 9, Billings.

Proponents: Betsy Brandborg, State Bar of Montana

Opponents: None.

Opening Statement by Sponsor:

SEN. BRENT CROMLEY explained all State Bar Applicant backgrounds are examined by the Montana Supreme Court and their fingerprints sent to the FBI. The FBI sends back its results to the State Bar. The FBI considers the State Bar a private entity. The State Bar falls under the auspices of the Supreme Court but is funded by the dues of its members. **SEN. CROMLEY** distributed a letter dated November 12, 2002, from Patrick J. Adams to Betsy Brandborg. **EXHIBIT(jus36a01).** This bill would have the fingerprint results sent to the Montana Supreme Court.

Proponents' Testimony:

Betsy Brandborg, counsel for the State Bar of Montana, feels this is a critical part of the State Bar of Montana's review process. The State Bar has approximately 150 applicants a year and a couple of times a year they discover something as a result of the fingerprinting process that would cause concern with admitting someone to the Bar.

Opponents' Testimony:

None.

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL asked if the applicants pay for the investigation. **Ms. Brandborg** explained the entire cost of the admission process is paid by the applicant, which is approximately $300. The State Bar does not make any money from this program. The admissions process is regulated by the Supreme Court, but housed with the State Bar of Montana for administrative reasons.

SEN. O'NEIL asked if the $300 includes taking the Bar exam.

Ms. Brandborg replied there are student applicants and attorney applicants. The attorney applicant charge is higher and the fees change regularly.

SEN. O'NEIL asked if the State Bar, Board of Bar Examiners, and the Supreme Court's Commission on Character and Fitness are the same entities.

Ms. Brandborg responded they are not, and one person is the Bar Admissions Administrator. This person is housed with the State Bar and when it comes into the legal arena, **Ms. Brandborg** goes into the appropriate arena, answers questions, and gives legal advise.

SEN. O'NEIL asked if the Commission on Character and Fitness has a similar relationship with the Montana Supreme Court as the State Bar.

Ms. Brandborg explained when the State Bar was integrated, there were certain responsibilities the Supreme Court wanted to have administered, so they created Commissions. **Ms. Brandborg** stated the Commission on Practice, which is responsible for disciplining attorneys, is housed in the Supreme Court. The Commission on Character and Fitness, a relatively newer entity, has been housed with the State Bar.

Closing by Sponsor:

SEN. CROMLEY closed stating he would be glad to answer any questions.

EXECUTIVE ACTION ON SB 285

Motion/Vote: SEN. AUBYN CURTISS moved **TO RECONSIDER SB 285.** The motion **CARRIED** with **Senators Mangan** and **Pease voting no.**

Motion: SEN. MIKE WHEAT moved **SB 285 DO PASS.**

Discussion:

Motion: SEN. O'NEIL moved **to amend SB 285** so the portion that the attorney fees come out of will be the portion which does not go to the plaintiff.

Discussion:

SEN. O'NEIL explained punitive damages are the jury's way of reimbursing somebody for their expenses, costs, and frustrations in taking a case to court. Therefore, he does not believe these fees should come out of the plaintiff's portion.

Valencia Lane explained that fees and costs would then have to come out of the 50 percent that goes to the state. **Ms. Lane** stated on page 3, subsection (b), line 4, the phrase "less costs and attorneys' fees."

Vote: SEN. O'NEIL's motion that **SB 285 BE AMENDED CARRIED** by roll call vote.

Motion/Vote: SEN. DAN McGEE moved that **SB 285 BE INDEFINITELY POSTPONED.** The motion **CARRIED** by roll call vote.

HEARING ON HJR 1

Sponsor: **REP. CHRISTOPHER HARRIS, HD 30, Bozeman.**

Proponents: **Al Smith, Montana Trial Lawyers' Association**

Opponents: **None.**

Informational Witness: Chris Manos, Executive Director, State Bar of Montana,

Opening Statement by Sponsor:

REP. HARRIS introduced HJR 1 as the "lawyers do not have to be liars" resolution. **REP. HARRIS** explained in the practice of law and rather than filing an answer, the defendant's lawyer will file a motion to dismiss for failure to state a cause of action for which relief can be granted. This can be a perfectly good motion, if that argument is valid. Often times, this motion is used as a delay tactic to gain further time within which to file an answer. This is not a practice used in other states and may very well violate Rule 11 of the Montana Rules of Civil Procedure. In addition, this motion is not recognized in federal court. HJR 1 will recognize it is a violation of Rule 11 to file non-meritorious motions to dismiss, but recognizing more time might be necessary to file an answer. HJR 1 extends the time within which to file a valid answer from 20 to 35 days. This is approximately the amount of time lawyers will get anyway by filing an empty motion to dismiss. HJR 1 simply requests the Supreme Court to make this rule change and does not actually change the rule. **REP. HARRIS** feels the Supreme Court has not made this rule change previously because the practice of filing an empty motion to dismiss occurs at the District Court level, not in appellate courts.

Proponents' Testimony:

Al Smith, representing the Montana Trial Lawyers' Association, supports the resolution and feels it may be a tiny step in giving some certainty as to when an answer to a complaint can be expected. **Mr. Smith** testified this is the practice, and 35 days is closer to the reality of when an answer can be expected. This is not something that can be imposed upon the Supreme Court, but they can suggest the Supreme Court take a look at this issue. Filing for Rule 11 sanctions is not something plaintiffs' attorneys are willing to do because it is disruptive to relationships.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. CROMLEY asked **Mr. Smith** if this would cut down on Rule 11 motions.

Mr. Smith corrected **SEN. CROMLEY** and repeated that plaintiffs' are reluctant to file Rule 11 motions for sanctions. They would prefer that defense attorneys just call and ask for an extension.

SEN. O'NEIL stated sometimes people have difficulty getting an attorney, and he witnessed such a case where the Clerk of Court advised filing a motion to dismiss. **SEN. O'NEIL** is concerned that a defendant would wait until the end of the 35 days and then ask for more time.

Mr. Smith replied there is that risk, and there will be some folks who will use the 35 days like they use the 20 days. He believes if that became the practice, plaintiffs may more often file for Rule 11 sanctions.

SEN. O'NEIL asked why not just file a motion for extension of time rather than a motion to dismiss.

Mr. Smith answered that is what would happen now if people would bother to call opposing counsel and request an extension of time.

SEN. O'NEIL asked why we should go to 35 days if that is the case.

Mr. Smith stated they are seeking less and less of that communication and it is becoming common practice just to file the motion to dismiss rather than making a telephone call to opposing counsel. In addition, sometimes it is difficult to reach opposing counsel.

SEN. CROMLEY informed **REP. HARRIS** that current statutes give insurance companies 30 days to file an answer and wondered if they should make a corresponding increase to that statute.

REP. HARRIS does not have an objection to that modification. He noted if that provision is in the Montana Rules of Civil Procedure, it will need to be changed by the Supreme Court.

SEN. WHEAT asked why not change 35 days in the bill to 30 days. This would be consistent with the amount of time given to insurance companies.

REP. HARRIS did not have an objection to changing 35 days to 30 days.

(Tape : 1; Side : B)

CHAIRMAN GRIMES asked if the Rules of Civil Procedure are written by the Supreme Court or if they are from the Code.

REP. HARRIS explained the rules are in the Code, but the Constitution infers on the Supreme Court the authority to adopt and revise the Rules of Civil Procedure.

CHAIRMAN GRIMES stated he has never seen a Resolution asking the Supreme Court to do something like this, and it seems odd to him.

REP. HARRIS replied the Constitution infers on the Supreme Court the authority to adopt and advise these rules. The Legislature can knock on the Supreme Court's door and say, excuse me, but there is a problem with a rule, would you look at it.

CHAIRMAN GRIMES asked what venues are open to members of the bar when they want to change the language in the Montana Rules of Civil Procedure.

REP. HARRIS responded nothing prohibits a member of the Bar from writing the Supreme Court and making suggestions. If a suggestion comes from the Legislature, it will be carefully considered by the Supreme Court.

SEN. O'NEIL reminded the Committee that last session he had a bill that would allow the Legislature to make rules.

Chris Manos, Executive Director of State Bar of Montana, clarified that the court has established Commissions and one of those Commissions has oversight for Rules of Civil Procedure. If this bill were to pass, the court would probably send it to that Commission for review and recommendation. This does consider the

various suggestions from members of the bar and public to look at the rules in various aspects.

CHAIRMAN GRIMES asked if it would be more or less considered by the Supreme Court or the Commission if there were a number of attorneys who signed a letter making this request, as opposed to a Resolution.

Mr. Manos could not speculate as to how the court might receive either. He is sure the court will refer this issue to the proper Commission.

CHAIRMAN GRIMES is naive as to the issues and tensions that exist within the bar and the Supreme Court and is wondering how this will be received.

SEN. McGEE in reviewing Article VII, section 2, subparagraph (3), of the Montana Constitution which says rules of procedure shall be subject to disapproval by the Legislature in the following two sessions. **SEN. McGEE** asked if based on that language and if Rule 41 was put in place by the Supreme Court, that the Legislature could disapprove of Rule 41 in the next two sessions following that action.

Mr. Manos replied that is correct, but it would not work in this situation.

SEN. McGEE feels it gives standing to the Legislature recommending a rule change to the court.

Mr. Manos agrees that the context of that rule authorizes the Legislature to make suggestions to the Supreme Court.

SEN. CROMLEY asked **REP. HARRIS** if he has had any contact with the Commission on Rules, the State Bar, or other attorneys to find out what their attitude is toward the proposed change.

REP. HARRIS stated he has not discussed this with the Commission, but has been thinking about this problem for quite some time. In his own practice of law, he has suggested to other attorneys if they withdraw their motion to dismiss, he will grant them whatever additional time they need to file an answer. In speaking with other attorneys, their attitude is yes, it is fiction, but we have been doing it for so long, do not worry about it. **REP. HARRIS** feels if you read Rule 11 carefully, you are not supposed to file non-meritorious motions. Therefore, this practice is a direct contradiction to the actual rule itself.

CHAIRMAN GRIMES feels we have a responsibility to object to rules within two sessions, but he is assuming no previous Legislature has chosen to try to change rules through Resolution. **CHAIRMAN GRIMES** is worried about the precedent this sets and wonders if this has been used before, and if there is any sensitivities they may not be aware of.

Mr. Manos does not have any historical background on this and did not care to speculate as to how this may be perceived by the court. The court has seen fit to establish a separate Commission staffed by members of the Bar, who consider these matters routinely.

Closing by Sponsor:

REP. HARRIS closed stating he strongly believes in separation of powers, but separation of powers does mean the three branches cannot communicate with each other. HJR 1 is a communication asking the court to take a look at this fictitious practice that has developed and offers a potential solution.

EXECUTIVE ACTION ON SB 398

Motion/Vote: **SEN. McGEE** moved **SB 398 DO PASS.** The motion **CARRIED unanimously.**

HEARING ON SB 394

Sponsor: **SEN. GARY PERRY, SD 16, Bozeman.**

Proponents: **Charles Brooks, Billings area Chamber of Commerce**

Opponents: **John Alke, Montana Defense Trial Lawyers' Association**
Al Smith, Montana Trial Lawyers' Association
Bob Worthington, Montana Municipal Insurance Authority

Opening Statement by Sponsor:

SEN. PERRY opened stating SB 394 addresses fairness in litigation. Litigation, and costs in defending against causes of action, are very expensive, and it is difficult to defend one's self against frivolous claims. If a person or entity brings a frivolous claim, there is no penalty other than paying their own attorney fees. Section 25-10-201 refers to costs generally allowable, and existing law names those costs and includes witness fees, deposition fees, publication fees, filing fees,

stenographer fees, and other reasonable and necessary expenses. The fee not included is attorney fees. **SEN. PERRY** wonders why the prevailing party can be awarded these costs and not attorney fees, which is the highest cost of defending a lawsuit.

Proponents' Testimony:

Charles Brooks, representing the Billings area Chamber of Commerce, stated this is a fairness issue. During the interim, they have a series of meetings to draft position papers for the Chamber. **Mr. Brooks** quoted the basic philosophy from the Billings Chamber which stated the Chamber supports limiting frivolous legislation and litigation. **Mr. Brooks** reminded the Committee that district courts are loaded with cases and this could help alleviate the work load. **Mr. Brooks** feels this bill has merit.

SEN. O'NEIL stated he may have a conflict of interest with SB 394 since he is a mediator and this may increase his business.

Opponents' Testimony:

John Alke, representing the Montana Defense Trial Lawyers' Association, stated a loser-pay provision will only work if all parties have the same resources and if American law is completely re-written. **Mr. Alke** gave an example of a lawsuit and how a loser being required to pay attorney fees will not discourage litigation.

(Tape : 2; Side : A)

Mr. Alke spoke about cases that settle and the impact of SB 394. Plaintiffs will have a realistic chance of explaining to the court that the attorney fee they are entitled to is the contingent fee. The theory of the bill is that the prevailing party be left in the position as if they did not have to litigate. The award of attorney fees will be the contingency fee. In order to discourage litigation and unclog the courts, you do not want to have "loser pays." This already exists under Montana law under residential landlord/tenant law. **Mr. Alke** submitted a case entitled Solem v. Chilcote, 274 Mont. 72, 905 F.2d 209. **EXHIBIT(jus36a02)**. This case dealt with a landlord/tenant relationship wherein the landlord withheld $215 of a $300 cleaning deposit. The tenant prevailed at district court, and the landlord appealed to the Montana Supreme Court. The Supreme Court ruled in favor of the landlord. The attorneys' fee awarded to the tenant at the district court level was $5,300. In small cases, the most important thing will become the attorney

fees. Expanding loser pays attorney fees to all law will generate a series of problems and situations which will be the exact opposite of **SEN. PERRY's** intention.

Al Smith, representing the Montana Trial Lawyers' Association, stated there is a split among the Montana Trial Lawyers' Association (MTLA) members regarding the overall impact of this bill. However, the overall opinion of MTLA is that this is not a good bill for most Montanans. For people who have a lot of money, or are very poor, this is a good bill. For the middle class, a contingency system allows them access to court when they believe they have a valid claim. A loser pays system will take those folks in the middle class, who have something to lose, and put a chilling effect on them. There is always the possibility they could lose. For people who do not have much to lose, it would work. Attorneys' fees could easily far exceed damages. This will cause more litigation and will increase the caseload in courts. In addition, it will increase incentives for attorneys to litigate non-meritorious claims since they would get their attorney fees. **Mr. Smith** feels it is best to keep the American rule and the current fee system.

Bob Worthington, representing the Montana Municipal Insurance Authority (MMIA), testified the MMIA is involved in substantial claims brought against cities and towns in Montana. Frequently, the main issue is damages. This will increase the cost of litigation and this has been the experience of the MMIA. The MMIA opposes this legislation and does not believe a "loser pays" philosophy will work.

Questions from the Committee Members and Responses:

SEN. WHEAT stated he is sensitive about the issue of frivolous lawsuits and asked **Mr. Alke** if Rule 11 is an adequate tool to deal with the issue of frivolous lawsuits.

Mr. Alke spoke from limited experience and responded that in the 25 years he has practiced law, he has never come across a case he thought was completely, totally frivolous. He has frequently come across cases where he thought the damages being sought were grossly unreasonable. **Mr. Alke** stated a totally frivolous lawsuit does not occur frequently. "Loser pays" will not bring the parties toward settlement, but will force them further apart. Rule 11 will resolve completely frivolous lawsuits.

CHAIRMAN GRIMES stated the operative language is "as determined by the court," and that may mitigate some concerns. The intentions of the sponsor could be achieved if the court weighed some of the issues and made an award accordingly.

Mr. Alke responded this did not alleviate his concerns. This bill will apply to the vast array of civil litigation. There is no way to litigate an $80 case for $80 in attorney fees. In small cases, fees will be awarded based on compensating the attorney. The courts charged with making the prevailing party whole are not going to come up with small numbers; they are going to make sure the attorney is compensated. This is not the correct priority.

SEN. O'NEIL asked **SEN. PERRY** if he has looked at offers of judgment in Rule 68. **SEN. O'NEIL** feels the reference to costs in that rule would include attorney fees and this will address **Mr. Alke's** concerns. **SEN. O'NEIL** submitted the portion of Rule 68 of the Montana Rules of Civil Procedure which applies to offers of Judgment. **EXHIBIT(jus36a03).**

SEN. PERRY responded an attorney would include attorney fees in an offer of settlement.

SEN. O'NEIL explained that he feels SB 394 would prompt people to make offers of judgment more often and would help limit litigation.

SEN. PERRY responded he did not believe Rule 68 applies to SB 394. In his experience, settlement offers are nothing more than an offer to settle the case to save the expense of your own attorney fees.

SEN. O'NEIL was trying to make the same argument, looking at it a different way and that fair offers of judgment should be considered when attorney fees are awarded.

(Tape : 2; Side : B)

Mr. Alke stated the opposite is true with the way "loser pays" will interface with offers of judgment. It would not matter what the verdict is. This bill will require attorneys' fees be paid as costs. Typically, costs are filing fees, depositions, and witness fees. Those costs are typically paid by plaintiffs. This bill will mean if plaintiff did not accept the offer of judgment, the plaintiff will still get their attorney fees. Maybe they will have to pay defense attorney fees under Rule 68, but it will be really bizarre. Loser pays will make it very difficult to determine who is a winner and who is a loser. **Mr. Alke** spoke about a drunk driver who hits a parked truck and dies. His estate then sues the owner of the truck because it should not have been parked there. If the estate wins, the owner of the truck will pay attorney fees. If either the truck owner or the state wins, who will pay attorney fees? After a trial and a

ruling of comparative negligence, does the party who is least wrong pay attorney fees?

CHAIRMAN GRIMES asked if there are other jurisdictions that have gone to a form of loser pay and have experienced mixed results.

Mr. Alke could not recall, but stated under certain subject area of the laws, loser pays exists in Montana, but he could not give a score on how that has turned out.

Closing by Sponsor:

SEN. PERRY closed stating this is a complicated issue and stated he wants fairness. **SEN. PERRY** talked about two neighbors who were involved in litigation because of the removal of a hedge by one neighbor to gain three feet of property. The defendant in this action had to continue to pay attorney fees. In addressing **Mr. Smith's** concern, **SEN. PERRY** stated Section 25-10-404 reads poor people are not required to pay costs. **SEN. PERRY** refuted **Mr. Smith's** comment that trial lawyers are split on the issue by stating this should raise questions since obviously some trial lawyers feel it is fair. **SEN. PERRY** stated the opposition indicated this bill may increase lawsuits-not will increase lawsuits. In each of the three lawsuits **SEN. PERRY** has been involved in during the last 15 years, he has been advised by his attorney to settle. **SEN. PERRY** stated it has nothing to do with whether he is wrong, it is a purely economic decision he makes for his business, and settling is the cheapest way out. **SEN. PERRY** feels the best way to protect his business is to rely on the truth. Truth is more important than settling for injustice based on a lie. Currently, **SEN. PERRY** has been fighting a $156 claim for four years and has been to the Supreme Court and back. This claim is still going on because the other attorney wants his attorney fees. So far, this has cost him $35,000. Every year, cases are settled because it is cheaper. This requires his business, and other businesses in Montana, to budget for frivolous lawsuits which may occur, and interferes with economic development and the growth of jobs in Montana.

SEN. PERRY finds it odd that both sides of the profession have opposed this bill. He feels this is because attorneys have an interest either way. The person being sued will pay the burden of the lawsuit.

SEN. PERRY pointed out sections in Montana Code, such as 25-10-01, 25-10-303, 25-10-302, 25-35-86, which address costs and attorney fees, and how these sections are inconsistent. In cases on appeal, the court may grant reasonable attorney fees in addition to costs. **SEN. PERRY** feels attorney fees should be

included in allowable costs and urged the Committee for a favorable recommendation.

EXECUTIVE ACTION ON SJR 10

Motion: **CHAIRMAN GRIMES** moved for **RECONSIDERATION OF SJR 10.**

Discussion: **CHAIRMAN GRIMES** supports the bill but feels the timing is not right. **CHAIRMAN GRIMES** stated sometimes it takes a number of times for a bill to come before the Legislature before an idea takes hold. He used the example of "do not call" lists as an example.

SEN. O'NEIL resisted **CHAIRMAN GRIMES'** motion to reconsider, and feels this issue should be debated before the body. It needs to be brought before the public and not locked in a committee room. **SEN. O'NEIL** feels the issue needs exposure.

(Tape : 3; Side : A)

Vote: The motion that **SJR 10 BE RECONSIDERED FAILED** with **Senators Grimes, Mangan,** and **Cromley voting aye.**

EXECUTIVE ACTION ON SB 37

Discussion:

CHAIRMAN GRIMES submitted a worksheet reflecting the work the Committee had already completed regarding license suspension. **EXHIBIT(jus36a04).**

SEN. WHEAT verified the worksheet contains the Committee's decisions regarding license suspension and decisions the Committee had made previously.

CHAIRMAN GRIMES verified that was true and it was now time to address the "refusal to blow" section. For forth offense felony, existing law applies and this will create a problem because people will refuse to blow. **CHAIRMAN GRIMES** stated under current law, there is a probationary license issue, even though the driver's license is sealed. **CHAIRMAN GRIMES** is proposing for first offense DUI, if a person refuses a breathalizer, they will receive a hard suspension of their driver's license for one year, with no chance of a probationary license being issued. After that, an interlock devise will be mandatory for the following year.
CHAIRMAN GRIMES then suggested the Committee address the issue of fines and jail time and attempt to fit refusal issues in.

SEN. CURTISS asked the Committee to keep in mind the overload the correctional system is facing right now. **SEN. CURTISS** feels the Legislature needs to get as tough as possible with first and second offenses.

CHAIRMAN GRIMES explained that first offense under jail time and penalties currently require 24 hours to six months and all except one day can be suspended, provided there is treatment. **CHAIRMAN GRIMES** does not know, however, if that is if treatment is agreed to or completed.

SEN. WHEAT suggested giving discretion to the Court to say you have to spend one day in jail, but you will spend more unless you sign up and agree to go to a treatment program. If the offender does not complete the treatment, the court can put them back in jail.

After reviewing current statute, **CHAIRMAN GRIMES** reported the offender has to successfully complete treatment and the judge can force an offender back into court if he fails to comply. The only suggested change for first offender DUI is providing a community service option. The first-time fine will be raised from between $100 and $500 to between $300 and $1000.

SEN. WHEAT added that in Bozeman, the courts almost always fine DUI offenders $500.

Regarding community service, the Committee agreed to leave these options in.

CHAIRMAN GRIMES, in serving on the DUI Task Force heard there were many outstanding warrants for unpaid penalties. Therefore, the amount of the fine is, in a lot of cases, ineffectual.

SEN. PERRY feels the Committee is massaging the old penalties which have not worked. The jails are plugged and overwhelmed primarily from DUIs. In addition, the prisons are overcrowded with DUIs. Increasing the penalties has not worked in the past. People cannot pay their fines, warrants are issued, and the offender ends up in jail. **SEN. PERRY** believes electronic incarceration is a viable option.

CHAIRMAN GRIMES was sympathetic, stating the Committee feels the same frustrations.

SEN. CURTISS suggested that when DUI offenders are performing community service, they wear a T-shirt that stated "DUI Offender."

Ms. Lane was uncertain if that would violate a person's constitutional rights, and agreed to research the issue.

SEN. O'NEIL is not convinced the DUI laws are as ineffective as people believe because he feels drinking and driving mean a lot more now than it has in the past. **SEN. O'NEIL** believes that while we have not conquered the problem, Montana is making headway on this issue.

CHAIRMAN GRIMES asked if anyone wanted to propose raising the fines up from what is provided in current law.

SEN. WHEAT agrees with increasing the fines for first- through third-offense DUIs. However, he agrees with **SEN. PERRY** that getting a grip on this problem will have to consist of more than increasing fines. **SEN. WHEAT** feels we need to seriously consider treatment and other methods of keeping track of people. This will entail convincing the Legislature, as a whole, to appropriate more money. The issues raised by **SEN. PERRY** will need to be considered philosophically and monetarily.

SEN. McGEE agrees with **SEN. WHEAT** and **SEN. PERRY**. **SEN. McGEE** feels the fine for first-time DUI should be $500 to $1,000. In addition, he would add 24 hours to six months jail and/or DOC commitment for electronic monitoring. For the second-time offender, **SEN. McGEE** would like to go seven days to one year in jail, but would let that fall back to nine months, and/or DOC commitment for electronic monitoring.

CHAIRMAN GRIMES is concerned that first-time commitment to DOC monitoring would be inconsistent with attempts to let an offender off the hook if they do not receive another DUI within five years. It is the repeat offenders they are trying to target. Therefore, he feels the electronic monitoring should be made applicable with the second DUI.

SEN. McGEE would like the court to have discretion. In addition, he would like to change the seven days to six months to be seven days to nine months. This seven days should be hard time. He would like to add and/or DOC commitment for electronic monitoring.

Ms. Lane stated Title 46, Chapter 18, part 10, has to do with home arrest and contains definitions. The supervising authority, in the case of an adult felon, is the Department of Corrections. In the case of an adult misdemeanant, it means a court-approved entity other than the Department of Corrections. **Ms. Lane** is not sure what court-approved entity would be utilized.

SEN. McGEE would increase fines from $500 to $1,000 for first-time offenders. For the second offense, he suggested going $600 to $1,000 for a fine, and a hard seven days up to nine months and/or electronic monitoring, at the court's discretion. For the third offense, thirty days to one year would be hard time, and/or electronic monitoring. **SEN. McGEE** wants to be careful not to limit the scope to electronic monitoring.

CHAIRMAN GRIMES stated he thinks it may be the local counties who provide electronic monitoring.

(Tape : 3; Side : B)

SEN. CROMLEY asked if there has to be a specific authority in the statute to apply the 24 hours or six months in jail for first-offense DUI, and whether the person can be sent to an actual jail or electronically monitored, and when that would come into play.

Ms. Lane responded she was not certain and would check into it. She seemed to recall they usually specify certain available options under Title 46, Chapter 18.

SEN. CROMLEY asked if home arrest can be used right now. **Ms. Lane** stated it could be used, but it does not allow a person to go out and make a living. **Ms. Lane** stated she does not know enough about home arrest and how it works to advise the Committee.

SEN. McGEE explained that his experience is that people with third and fourth DUIs do some portion of their sentence in jail and the balance is served with electronic monitoring.

CHAIRMAN GRIMES stated they would attempt to use other alternatives in an effort to mitigate the impact to the judicial system.

SEN. O'NEIL stated he had a friend who had to use electronic monitoring and had to contract with a private company and pay for the service himself.

SEN. WHEAT reminded the Committee there are a lot of people who cannot afford this. If they cannot afford to pay the fine, they will be unable to afford to pay for anything else. **SEN. WHEAT** cautioned the Committee about putting together something that is going to cost a lot of money.

SEN. McGEE agreed there are a lot of people who do not have money, but continue to get DUIs. There are other people who do not have the money, but they work for it. If a person is serious

about straightening up their act, they will find a way. In Billings, they have established a drug court and people have to contract with the court. People who are serious about straightening up their act will do it. In contrast, there needs to be sanctions in place for those who are not serious. This is what society expects. Where we can allow people to go to treatment and people choose to do that, we want to help them. There should never be an instance where an individual has 11 DUIs.

CHAIRMAN GRIMES stated **Ms. Nordland** has told him there are about 200 multiple offenders a year. In SB 123 they did have a forfeiture of vehicle in an effort to raise money to give back to the victim. You could just as easily make that money go to the county. In many cases, however, the vehicle will not be worth anything.

CHAIRMAN GRIMES feels the Committee should check into the monitoring option and insert additional fines. **CHAIRMAN GRIMES** asked Valencia about the per se violation and when those penalties apply and if it is equivalent to pleading down.

SEN. WHEAT replied it can be used as a negotiating tool. Both DUI and per se depend upon a certain percentage concentration of alcohol in the blood. **SEN. WHEAT** does not view it as pleading down. He does not know if sentencing terms are different under DUI than they are under per se.

Ms. Lane explained that the penalties are a little lighter for per se. In per se, the offender has a blood alcohol concentration (BAC) test and if they are over .10, they are per se. DUI comes in on other evidence. Maybe the offender does not have the BAC test results or the offender is under, but there is other evidence that they were driving under the influence.

CHAIRMAN GRIMES wondered why they should allow a lesser penalty under per se than under DUI.

SEN. WHEAT explained in some instances the prosecuting attorney could charge under DUI or per se. In other instances, he may only be able to charge under DUI because there was no BAC taken.

Ms. Lane asked the Committee to note that refusal to blow only addresses DUIs and not per se violations. The fines are the same under both, but the jail time is different.

SEN. O'NEIL thought it used to be that per se did not count as a first DUI on the record.

Ms. Lane disagreed and stated per se violations do count on a driver's record.

CHAIRMAN GRIMES summarized the Committee's work, stating they have increased penalties with the commitment to monitoring, and that issue needs to be researched.

SEN. CROMLEY stated the Committee does not have a very good background on the per se violation.

CHAIRMAN GRIMES agreed to do some checking on the history and consequences of the per se violation.

Rep. Brad Newman, HD 38, Butte, came before the Committee to explain the per se violation for DUI. **Rep. Newman** explained that the impact of a per se violation on insurance is pretty much the same as a DUI. In addressing the offenses themselves, the factual differences between the two offenses is that DUI is an offense that prohibits a driver from either operating or in being actual physical control of a vehicle while under the influence of alcohol. That term is defined in Code as having the ability to drive safely being diminished by consumption of alcohol or other substance. Per se is a flat offense that says if you are operating, or in actual physical control, of a vehicle and your blood alcohol is .10 or higher, you are automatically guilty of that offense. In the DUI context, the BAC is looked at as evidence. They also look at physical motor skills, the ability to recall, the ability to communicate, and the ability to process information. Some of the field tests are designed for the officer or investigator to determine whether the motorist is able to receive a standard set of instructions, remember those instructions, and then be able to perform. There are numbers in the DUI statute itself which state if the BAC is .04 or less, that a person is not under the influence. If it is .04 up to .10, then the trier-of-fact will consider that level along with other evidence. If it is .10 or higher, you are under the influence of alcohol. If the prosecutor is prosecuting for DUI and the evidence is the BAC is .12, but the issue is not per se, but DUI, then the defense faces an inference that the defendant was under the influence, but is allowed to rebut that with other evidence. In a per se prosecution with a .12 level, if the other evidence is established, the person is guilty and there is no provision for rebutting evidence. Therefore, the two offenses are treated a little differently evidentuarily. The real advantage for a defendant to plead guilty to a per se rather than a DUI would be there is no mandatory jail time for a first-offense DUI. At the fourth offense level, all DUIs and per se violations are treated exactly the same. **Rep. Newman** directed the Committee to look at 61-8-714 and 61-8-722 which are the

sentencing statutes for DUI and per se, and to notice that the first offense per se carries no mandatory minimum jail time. Frequently, defense counsel will offer to plead guilty to the per se offense to avoid the mandatory jail time. In second or third offenses, there is mandatory jail time for either offense.

CHAIRMAN GRIMES asked if a person refusing the breathalizer would be charged under per se or otherwise.

Rep. Newman replied absolutely, because it makes it much more difficult to prove a per se offense if you do not have the scientific evidence. If they refuse the test and other evidence supports the inability to drive safely, a DUI will be charged. It will not preclude the court from accepting a plea later to a per se, but it will influence what is initially charged.

SEN. CROMLEY stated it seems no harm would be done by doing away with the per se statute as long as there are effective DUI statutes. **SEN. CROMLEY** asked if the per se statute was brought about as a tool for prosecution to enforce laws, or if it was brought to favor the defense to give them an alternative to harsh sentences of DUI.

Rep. Newman responded that because of incorporation of the different per se concepts in the DUI statute, if you were to strike the per se statute, you would still have a DUI statute and still have the various statutory frameworks in place that, under .04 you are presumed not to be under the influence, and between .04 and .10, it is basically a wash, and both sides present evidence. If a person is over .10, it is inferred they are under the influence, but it can be rebutted by defense counsel. There is a situation in the House and Senate where there is a three-legged stool because of federal mandates. We are looking at raising the penalties and lowering the bar as far as the level of intoxication. The third leg of that stool is how do you prove the offense. The applied consent law mandates that if you exercise the privilege of driving on private roads, you have implicitly consented to one of these tests. Placing this in law, lets people refuse or not refuse the test. If they refuse the test, they suffer an administrative consequence such as suspension of license, but they do not suffer a criminal consequence. Therefore, the question we need to ask is how to keep the stool balanced, so we are not enacting laws that have no meaning. The questions needed to be asked are, "Do we need the per se statutes?" "How are we going to balance this?" "How are we going to get the evidence if we retain the per se statute?"

SEN. McGEE talked about the level of fines now and the inability of people to pay those fines and asked for **Rep. Newman's** perspective.

Rep. Newman replied that in Silver Bow County there are thousands of dollars in unpaid fines and a significant number of those are DUI and DUI offenses. Some of these unpaid fines are because a defendant is unable to pay, some are because a defendant is unwilling to pay.

(Tape : 4; Side : A)

CHAIRMAN GRIMES has checked with the Departments of Corrections and Justice about electronic monitoring and informed the Committee that options are endless and technology is improving and expanding all the time.

HEARING ON SB 397

Sponsor: **SEN. AUBYN CURTISS, SD 41, Fortine.**

Proponents: **John Bloomquist, Montana Stock Grower's Association**
Jake Cummins, Montana Farm Bureau
Al Kington, Self
Mike Collins, Self
Rob Natelson, Self

Opponents: **Janet Ellis, Montana Audubon**
Don Judge, Teamsters Union Local No. 190 and the Montana Chapter of the Sierra Club
Alec Hansen, League of Cities and Towns
Jennifer Bannon, Montana Information Center
Tim Davis, Montana Smart Growth Coalition
Judy Smith, Homeward
Daniel Watson, Rosebud County Commissioner, Montana Association of Counties
Richard Thweatt, Self

Opening Statement by Sponsor:

SEN. CURTISS opened the hearing on SB 397 by stating this bill is patterned after a citizens' initiative passed by Oregon voters in 2000. SB 397 is a fairness measure that provides when property values are reduced by agency restrictions placed on property for the public good, everyone shares the burden, not just the property owner. It is set forth in the Fifth Amendment of the U.S. Constitution and its concepts have been most recently upheld

by the U.S. Court of Federal Claims, which noted the Fifth Amendment is intended to "bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." The most notable court decision related to this issue was in the noteworthy case of Dolan v. Tiggert, where the property owner was awarded compensation because the City of Tiggert demanded an exchange for a building permit that Dolan provide land for a bike path. As planning and zoning become more prevalent across the nation, more and more property owners are denied the use of their property by regulatory restrictions. This bill just states if regulatory restrictions detract from the usage of property, you may be compensated accordingly.

Proponents' Testimony:

John Bloomquist, representing the Montana Stock Grower's Association (MSGA), testified the opponents will point out the breadth and scope of the bill. MSGA members are concerned about their real property rights, private property rights, and water rights. These are important property interests to ranchers. More and more they are concerned over planning and zoning. More and more they are feeling their property rights are infringed upon.

Jake Cummins, representing Montana Farm Bureau, testified that property rights remain the most important issue to their members. Property owners are most affected by various egregious rules and regulations imposed on them at every level and constant attacks by various groups for assumed violations of various issue. Many started out willing to open their land to folks and be willing to use their land for access to hunting, but over the years landowners have hardened from constant attacks. Landowners feel there is no protection for their interests. This bill will address that fundamental concern. **Mr. Cummins** feels property owners should be justly compensated for any reduction in the value of their property due to involuntary zoning, or the granting by the legislature or courts, of general public easements on or across private lands. This is an issue of fairness. It does not seem fair that landowners are constantly under attack and their property is constantly being used as a sounding board for every issue that happens to be popular at the moment. **Mr. Cummins** urged passage of SB 397 as a method to demonstrate that this Legislature and Committee is willing to treat landowners fairly and respect their private property rights as granted by the U.S. Constitution.

Al Kington, a land use consultant, works with rural family-owned ranches. These ranchers consider their land to be their bank.

It is the largest piece of collateral they have and any restrictions or impositions on the use of that land is critical to ranchers. **Mr. Kington** feels SB 397 is long overdue, and he asked the Committee for a do pass recommendation.

Mike Collins, a local resident, wondered how many people in the room would buy into the "what's mine is yours, what's yours is mine" philosophy. He does not, since he earned what he has. If he chooses to share with someone else, that is his decision to make. **Mr. Collins** stated it is interesting to look at Montana's Constitution from 1889, Article II, Section 3, which speaks to acquiring and protecting property. The current Constitution contains a similar section under Article II, Declaration of Rights, Section 3, which also includes acquiring, possessing, and protecting property. Looking at the Montana Environmental Policy Act (MEPA), there are six sections which specifically refer to protecting the right to use and enjoy private property free from undue government regulation. **Mr. Collins** feels this right deserves written protection.

SEN. McGEE, SD 11, Laurel, read a letter addressed to **SEN. CURTISS** from **Rob Natelson**. **EXHIBIT(jus36a05)**.

Opponents' Testimony:

Janet Ellis, representing Montana Audubon, opposed SB 397 and submitted a list of agency rules, **EXHIBIT(jus36a06)**, because it will paralyze state and local government. Everyone lives or works downstream, downwind, or down gradient from someone. This will diminish protections from damage caused by activity on other properties. If the state agency or local government cannot compensate, they can exempt the person from the rule, regulation, or policy. There is not enough money anywhere to compensate landowners. Under SB 397, one landowner will profit, while neighbors and taxpayers suffer. Some rules which will be affected are sign regulations, streamside management, clean air and water rules, private fish ponds, and shooting preserves. In addition, **Ms. Ellis** remembered the Racicot administration proposed a similar measure and read testimony of Ralph Peck from the Department of Agriculture when previous legislation was proposed. His concern was with the Quarantine and Pest Management Act, which would authorize the Department of Agriculture to adopt rules imposing quarantines to protect Montana agriculture. In addition, the previous legislation was opposed by the Department of Environmental Quality and the Department of Public Health and Human Services. In 1995 the Legislature passed HB 311, which required the Attorney General to adopt guidelines, and a checklist for state agencies that would prevent agencies from private property takings under the U.S. and

Montana Constitutions. This checklist is in place, and it has been working well. SB 397 goes beyond the criteria in the two Constitutions.

Don Judge, representing Teamsters Union Local No. 190 and the Montana Chapter of the Sierra Club, submitted written testimony in opposition of SB 397. **EXHIBIT(jus36a07).**

Alec Hansen, representing the League of Cities and Towns, runs a liability insurance program and deals with numerous land use actions. **Mr. Hansen** feels under the state and federal Constitutions, and as reflected in his program's actuarial reports, current law provides ample opportunity for people to be compensated in regulatory actions taken by municipal governments. **Mr. Hansen** used the regulations for subdivisions as an example of how current laws protect landowners. There is precedent in state and federal law which allows for compensating landowners for the effects of regulatory actions. This bill will make it extremely difficult for cities and towns to provide any type of zoning regulation. **Mr. Hansen** feels good zoning laws make good neighbors. **Mr. Hansen** urged the Committee to look at the fiscal note before acting on this bill and urged the Committee to look at the fiscal note from HB306 introduced in 1997. **Mr. Hansen** feels there is no way to come up with the money for this in light of the current budget crisis facing the state. He asked the Committee to consider the financial ramifications the bill will have on Montana's cities and towns.

(Tape : 4; Side : B)

Jennifer Bannon, representing the Montana Information Center, opposes SB 397 and spoke to the fiscal note from HB 306 in the 1997 Session. **EXHIBIT(jus36a08).** This bill imposed similar regulations and identified five percent in the reduction of fair market value. The fiscal note also highlights the increase in litigation expenses and time required if the bill had passed. This will create a tremendous cost to taxpayers at a time when state and local governments are strapped for revenue. In addition, Assumption 1 in the fiscal note would still apply.

SEN. McGEE objected to the testimony since the remarks deal with a fiscal note and bill from the 1997 session.

CHAIRMAN GRIMES asked if the legislation in 1997 was identical to SB 397.

Ms. Bannon responded the two pieces of legislation were similar, not identical. It is **Ms. Bannon's** understanding the former legislation would have less of a fiscal impact than the current

proposed legislation. She recognizes this bill could be different, but she feels it could have a greater fiscal impact. She urged the Committee to carefully review the fiscal note.

Tim Davis, Executive Director, Montana Smart Growth Coalition, submitted written testimony in opposition to SB 397. **EXHIBIT(jus36a09).** In addition, **Mr. Davis** stated the measure in Oregon had a $5.4 billion per year fiscal note. **Mr. Davis** feels the issue should be left in the courts. **Mr. Davis** also feels the net result is that property values will be diminished. The unintended consequence of the bill would be to create a whole new state bureaucracy just to deal with the administration of the law.

Judy Smith, representing Homeward, an affordable housing developer in Missoula and Billings, talked about the housing crisis in Montana and addressing balancing rights. The increase of homeless families is due in part because housing is becoming more and more difficult to afford. The average home in Montana sells for over $150,000. Therefore, fifty percent of the families in Montana cannot afford to buy a home. Families are being asked to pay over $500 a month for rent, and well over 25 to 30 percent of families cannot afford to rent. The cost of not providing affordable housing, the cost in lost opportunity, school performance, all come into play from lack of affordable housing. Local governments certainly have an interest in providing affordable housing. **Ms. Smith** feels this bill does not take us down a path toward balancing rights. The Supreme Court has talked often about balancing rights, and a property owner's rights must be balanced with others.

Daniel Watson, a Rosebud County Commissioner, representing the Montana Association of Counties, opposes this bill because of the mechanics of the bill. The counties are not in favor of assuming an additional cost and responsibility for the local taxpayers.

Richard Thweatt, a local attorney works with a group called "Plan Helena" which is interested in growth management issues. **Mr. Thweatt** feels this bill is a radical departure from existing law of takings. **Mr. Thweatt** agrees the best place for these cases is in the courts because of each case's uniqueness. **Mr. Thweatt** feels the legislation is over broad and will have adverse consequences on state and local governments. Land use regulation is becoming a crisis in Montana, and local governments need the ability to manage their growth. This bill will gut the ability of local government to accomplish this management.

Questions from Committee Members and Responses:

SEN. JEFF MANGAN asked **Mr. Bloomquist** if he would conceive the bill is broad. **Mr. Bloomquist** agreed it is broad.

SEN. O'NEIL asked **Mr. Kington** about affordable housing and the creation of dense neighborhoods in context with Oregon's law.

Mr. Kington could only speak to his personal experience and his property. He has no knowledge of what is being done in other states.

SEN. O'NEIL followed up by asking if **Mr. Kington** feels this bill would make housing more affordable or less affordable.

Mr. Kington responded that when a landowner is able to get more money for something imposed on him to develop the land would make housing more expensive. He does not see the connection between the bill and housing. If a person loses the value in his property because of the imposition of certain requirements by the government, he feels he should be justly compensated. **Mr. Kington** feels there are other variables which have to be considered in determining how this legislation would affect affordable housing. If the value of property is decreased through no fault of the landowner, he should be compensated.

SEN. CROMLEY has a client in Billings who operates a restaurant and has been cited by the Health Department for serving undercooked food. In fact, the Department of Health is threatening to close the restaurant down. This, in turn, would reduce his property value. Therefore, under this bill, his client would be able to recover the reduction in lost value of his property and attorney fees.

Mr. Bloomquist responded the way the bill is written, he would be able to recover under those circumstances. **Mr. Bloomquist** added the discussion on the fiscal note will be very interesting and if the fiscal note is $5.4 billion, that value is coming from somewhere. He feels this should frame an interesting discussion.

CHAIRMAN GRIMES asked **SEN. CURTISS** about the fiscal note from the 1997 session.

SEN. CURTISS responded that the taxation is unfair because it is being borne by the people whose property is being devalued. The fiscal note will reflect what the various opponents intend to impose on the landowners.

CHAIRMAN GRIMES then asked **SEN. CURTISS** to address the unintended consequence of decreasing property values if ordinances or other regulations were not enacted on a neighboring piece of property.

SEN. CURTISS believes there has been a lot of smoke blown around, and she believes the bill will make agencies more accountable and responsible for what they are planning to enact. Sometimes these agencies do not understand what the unintended consequences of their actions are. As open space laws are being created, property owners are being subjected to more restrictions. **SEN. CURTISS** does not feel this is what our forefathers envisioned.

SEN. MANGAN asked **Mr. Bloomquist** if he would agree that property values in the past have increased because of things that have been done that have had positive effects for all of Montana.

Mr. Bloomquist agreed there can be positive effects from regulation in terms of property value.

SEN. MANGAN followed up by stating it would be very difficult, if not impossible, to put a value on this.

Mr. Bloomquist, once again, agreed.

(Tape : 5; Side : A)

SEN. MANGAN then stated that benefit to the public would decrease if we decided to change the current law. The cause and effect theory would say if we change the procedure we are benefitting from, we would no longer benefit.

Mr. Bloomquist feels the Constitution is the check in balancing act. He feels if the benefit outweighs the cost, then the law should be changed. We need to look at what we are proposing in terms of regulation, the impact on the private property, to see if we are setting the state up for any liability.

SEN. MANGAN spoke to the exemptions in the bill. As an example, **SEN. MANGAN** used the affect of the local no smoking ordinance on local bars and taverns. He feels those businesses could have the same arguments based on loss of property rights. Why should ranchers have a right to recover from their losses, but not the tavern owners.

Mr. Bloomquist feels the exceptions can be built in. Police power has its limitations and is part of the balance. The exceptions take a similar argument from a certain segment to be treated differently.

SEN. O'NEIL asked **Mr. Cummins** if the regulations might cause additional costs upon the public and be harmful.

Mr. Cummins responded that is a possibility, and that they are attempting to balance competing needs. Currently, everything is unfairly balanced against landowners. **Mr. Cummins** pointed out if the costs are too great for government, they are even more so for individual landowners.

Closing by Sponsor:

SEN. CURTISS distributed a handout regarding myths about SB 397. **EXHIBIT(jus36a10)**. **SEN. CURTISS** feels for genuine public purposes, health and safety reasons, public accommodation, entities have the right of eminent domain which are exercised all the time. **SEN. CURTISS** believes passage of this bill will make entities more aware of the consequences of their actions. **SEN. CURTISS** pointed out that Measure Seven in Oregon was a constitutional amendment and that is the reason it has not been implemented. Apparently, there was a problem with the wording of a particular issue. The amount of $5.4 billions is a projected amount of what it is going to cost landowners.

ADJOURNMENT

Adjournment: 12:25 P.M.

_____
SEN. DUANE GRIMES, Chairman

_____
CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus36aad)