MINUTES

MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **VICE-CHAIRMAN DAN McGEE**, on March 11, 2003 at 9:00 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: HB 66, 3/5/2003; HB 40, 3/5/2003; HB 155, 3/5/2003; HB 199, 3/5/2003; HB 166, 3/5/2003; HB 134, 3/5/2003___
  Executive Action: HB 161, HB 134, HB 299

HEARING ON HB 66

Sponsor: **Rep. Christopher Harris, HD 30, Bozeman.**

Proponents: **Chris Tweeten, Chief Civil Counsel,**
Department of Justice

Opponents: **Tom Beck, Chief Policy Advisor for Governor Martz**
Dave Ohler, Chief Legal Counsel,
Department of Revenue
Kevin Braun, Chief Legal Counsel,
Department of Labor and Industry
John North, Chief Legal Counsel,
Department of Environmental Quality
Amy Pfeifer, Child Support Enforcement Division,
Department of Public Health and Human Services
Dal Smilie, Department of Administration
Marty Tuttle, Chief Legal Counsel,
Department of Commerce
Diana Koch, Chief Legal Counsel,
Department of Corrections

Opening Statement by Sponsor:

Rep. Harris stated this bill is a housekeeping bill, but has important fiscal ramifications for the state. Montana is a creditor in many bankruptcy proceedings, both small and large. These proceedings represent millions of dollars of potential revenue. HB 66 will ensure that when the state is a creditor, the state will be represented in bankruptcy proceedings by the Bankruptcy Unit within the Department of Justice. Bankruptcy has its own court, its own rules, and its own procedures. Therefore, not every lawyer practices in this area of law. Since there are millions of dollars of potential revenue, **Rep. Harris** feels Montana should be represented by the best attorney available. Some of the proceedings in which Montana is a creditor include the Enron and Worldcom bankruptcies. The Bankruptcy Unit in Montana has already recovered millions of dollars for the state of Montana and Rep. Harris would like to see that continue and ensure there is a central focus for the Bankruptcy Unit.

Proponents' Testimony:

Chris Tweeten, Chief Civil Counsel for the Department of Justice, explained the purpose of the bill is clarify provisions of law enacted in 1995 to centralize in the Attorney General's Office legal services related to bankruptcy. This history of the bill goes back to 1992. Governor Racicot and Joseph Mazurek both

campaigned on themes dealing with the improvement of the delivery of legal services to state agencies. After the election, there was a study of the legal services delivery system for state agencies. It was decided to have a baseline understanding of how those services were being delivered. The two offices jointly conducted a study which was chaired by Judy Browning and Mr. Tweeten. The task force consisted of administrators and chief attorneys from state agencies across the board in state government. Many of the agencies who will testify against HB66 were participants in this study. The study made various findings and recommendations, including the fact there are certain areas of legal practice which are significant for state agencies, but do not make up a significant part of each agencies workload. Therefore, it become difficult for agencies to develop and maintain the expertise in house to handle these matters. Bankruptcy was one of those areas. The task force's recommendation was the bankruptcy function should be centralized in the Attorney General's office. Subsequent legislation created a subsection to section 2-15-501 which makes it the duty of the Attorney General to represent the state in bankruptcy matters. **Mr. Tweeten** submitted a copy of the Task Force's report to Governor Marc Racicot and Attorney General Mazurek, **EXHIBIT(jus51a01)**, a fact sheet for the Bankruptcy Unit under the Department of Justice, **EXHIBIT(jus51a02)**, and correspondence from 1993 and 1995 directed to Attorney General Mazurek from Neal Jensen, a permanent bankruptcy trustee for the U.S. Department of Justice, **EXHIBIT(jus51a03)**. Mr. Jensen was very familiar with the bankruptcy court and the types of cases and issues which come before that court. The 1993 letter urged that the bankruptcy function in Montana be centralized in the Attorney General's office and provided three rationales for that argument. First, the current decentralized system did not work well as evidenced by claims in bankruptcy court which were not pursued. Therefore, the state was not maximizing its opportunities to recover. Second, bankruptcy is specialized area of law, consisting of its own court, code, judges, and attorneys. Attorneys who "dabble" in bankruptcy do not do very well. Third, the number of bankruptcy filings is skyrocketing across the United States. Therefore, to ensure state taxpayers are treated fairly in obtaining their portion of the recovery, the state needs to be represented by specialized bankruptcy counsel. Since creditors only recover a portion of their claim in a bankruptcy court, when Montana does not show up as a creditor, the other creditors recoup Montana's portion.

In 1995 the Legislature created the Bankruptcy Unit within the Department of Justice. It was created on a two-year pilot program with a sunset provision and was funded from the general fund. Within 13 months, the unit collected over $200,000 and

established a right to collect over $160,000. Between 1996 and 1998, collections exceeded a million dollars. In 1997, the unit was reauthorized and maintained its pilot status by maintaining the sunset language. The 1999 Legislature removed the sunset language and made the Bankruptcy Unit a permanent part of the Department of Justice. When the Unit was created in 1995, it was funded from the general fund. In 1997, the unit was placed on a proprietary fund status, meaning it had to generate fees from the agencies it represented in order to provide the financing it needed to pay its personnel services and operating expenses. The Unit has operated on a proprietary fund status since that time. Since 1997, agencies have continued to retain some bankruptcy legal work rather than referring that work to the Unit. **Mr. Tweeten** believes the Legislature intended all work to go the Bankruptcy Unit. The reason for this is the agencies were never given the funding to hire the Bankruptcy Unit. It is less costly in the short run for the agencies to keep the work in house. However, this destroys the efficiencies of having a centralized Bankruptcy Unit. **Mr. Tweeten** could not testify as to how many cases are being handled by in house legal staff as opposed to being handled by the Attorney General's Office. HB 66 will ensure all the bankruptcy legal work is handled by the Bankruptcy Unit. **Mr. Tweeten** feels this is more important than ever since there are now more than 4,000 filings in the Montana Bankruptcy Court every year. In addition, Montana often has claims against large companies who file in federal court. There are multi-million dollar claims held by the Board of Investments. **Mr. Tweeten** relayed that another case which is significant is W. R. Grace, the company responsible for the asbestos pollution in Libby. There are at least three agencies of state government that have claims against W. R. Grace. The Bankruptcy Unit, with the assistance of the Governor's Office in bringing the agencies together, has taken the lead in making sure the claims are appropriately asserted and the potential for conflict is minimized. This case illustrates why it is imperative there is a Bankruptcy Unit in the Attorney General's office.

Experience has shown that the hope of 1995 Legislature in creating a Bankruptcy Unit is not being fulfilled. Agencies are continuing to cross-train their staff in bankruptcy law. This is not an efficient use of training funds when the Bankruptcy Unit already has competent, experienced counsel in the Attorney General's Office.

HB 66 will clarify what they believe was the intention of the Legislature in 1995. This will make it clear it is the responsibility of the Attorney General, and this will reinforce the obligation of the agencies to send their bankruptcy matters to the Attorney General for representation.

Opponents' Testimony:

Tom Beck, Chief Policy Advisor for Governor Martz, stands in opposition to HB 66. **Mr. Beck** believes some of the bankruptcies are so unique, they are better left with the agency and used Pegasus Gold as an example since the Department of Environmental Quality had first-hand knowledge of the bonding and various aspects of the bankruptcy. **Mr. Beck** feels it would be better if the bill said "may" go to the Attorney General's Office, rather than "shall."

Dave Ohler, Chief Legal Counsel for the Department of Revenue, testified they currently use the Attorney General's Office on an as-needed basis. Many of their claims in bankruptcy court do not rise to the level of having to involve the Attorney General's office. Currently, DOR has a budge of about $5,000 per year to purchase services from the Attorney General's office. They estimate their costs would be approximately $50,000 to $70,000 per year if they were to utilize the Attorney General's Office on every bankruptcy action. In addition, **Mr. Ohler** is concerned about conflicts since there are times when the Attorney General and the Governor may not see eye-to-eye on how to proceed. **Mr. Ohler** urged the Committee to not pass HB 66.

Kevin Braun, Chief Legal Counsel, Department of Labor and Industry, appreciates the position of the Attorney General's Office, and consults with the bankruptcy attorneys as needed. He opposes the bill because of the financial considerations to his agency. They do not have a significant budget for contracted services. **Mr. Braun** believes cross-training makes for a better attorney staff and will make use of the Bankruptcy Unit when they need to. The vast bulk of his cases involve small claims for unemployment insurance and for workers' compensation liabilities. When bankruptcies are filed, they file a proof of claim. **Mr. Braun** opposes the bill because of the cost involved.

John North, Chief Legal Counsel, Department of Environmental Quality, opposes HB 66 because they feel the director of the agency, who is the individual responsible for the budget of that agency, should have control of the litigation budget. **Mr. North's** chief concern is with out-of-state bankruptcies. Over the past two years, his agency has been involved in the Pegasus bankruptcy and is now involved in the W. R. Grace bankruptcy. They are required by the out-of-state courts to hire local counsel.

(Tape : 1; Side : B)

Mr. North feels it would have been duplicative and would have added expense if they had hired the Attorney General's Office. On the other hand, with the W. R. Grace bankruptcy, they are using the Bankruptcy Unit. **Mr. North** appreciates the Bankruptcy Unit, but it is a question of allowing the director to manage the litigation budget in a manner that will enable them to provide cost-effective litigation for the department.

Amy Pfeifer, Child Support Enforcement Division, Department of Public Health and Human Services (DPHHS), testified their concerns is not just the cost, but because it requires a duplication of effort between the legal unit of DPHHS and the Attorney General's Office. This will create more work and cost more money, and will reduce DPHHS's cost effectiveness. This is a measure DPHHS is judged on at the federal and state level. In addition, cost-effectiveness of DPHHS is compared to that of other states and affects incentives. This bill will not result in additional collections and will not directly benefit the general fund. The child support they collect in bankruptcies is, in the majority of cases, paid to families not placed in the general fund. **Ms. Pfeifer** feels the bill will create a duplication of services and while bankruptcy is a specialty, so is child-support collection. DPHHS has resources available through the federal and state network of child support agencies if they need assistance. Having to refer the cases to the Attorney General's Office will increase their workload. They cannot send the whole file, because they continue to work on the other aspects of the cases. HB 66 would require them to do all the work, but then ship the case over to the Attorney General's Office for review. **Ms. Pfeifer** feels this is a duplication of effort.

Dal Smilie, representing the Department of Administration, accepts the Attorney General's basic premise that bankruptcy is a specific specialty. Most of the time, his agency refers their bankruptcy work to the Attorney General's Office. From time to time, there has been a turnover within the Bankruptcy Unit. HB 66 will make it mandatory to use the Bankruptcy Unit, and there may not be the expertise within the Unit at all times. Sometimes, they have the expertise within their own Department and he wonders why they would mandatorily have to hire the Attorney General's Office and have two sets of legal counsel. **Mr. Smilie** believes there should be an exception for this. It is necessary sometimes to hire local counsel in out-of-state bankruptcies. From time to time, a governor and attorney general will disagree on policy. Now, when you hire outside counsel, you have to go before a legal services review committee. **Mr. Smilie** feels the law is fine the way it is.

Marty Tuttle, Chief Legal Counsel, Department of Commerce, stated his agency has only two attorneys and soon will only have one attorney on staff. The Department of Commerce is no longer a regulatory agency, but is an agency that gives grants or makes loans. **Mr. Tuttle** spoke about the Moo Juice Dairy in Sidney, which was a $2.5 million project with $2.1 million in bank loans and the Department of Commerce provided the final $400,000. When this business went to foreclosure, the Department of Commerce was asked to forgive its lien. This is typical of the cases the Department of Commerce is involved with. Since the staff at the Department of Commerce is small, they do use the services of the Attorney General's Office. **Mr. Tuttle** worked on the Pegasus bankruptcy in Reno and stated most major bankruptcies will be filed outside the state of Montana and will require hiring local counsel.

Diana Koch, Chief Legal Counsel for the Department of Corrections (DOC), testified HB 220 will have the DOC collecting restitution for all felony victims in the state of Montana. Therefore, when an offender files for bankruptcy, the DOC will be advocating for the victims in bankruptcy proceedings. The DOC opposes HB 66 because they would like to represent those victims in bankruptcy proceedings rather than have the Attorney General represent them. **Ms. Koch** testified they oppose the bill because of the money involved in hiring the Attorney General's Office. Money recovered in these bankruptcy proceedings will not go to the general fund but will go to the victims.

Questions from Committee Members and Responses:

SEN. JEFF MANGAN asked **Mr. Ohler** if he opposed the bill in the House.

Mr. Ohler replied they did not because the bill came up rather quickly.

SEN. MANGAN asked at what point the Department of Revenue decided to oppose the bill.

Mr. Ohler could not give an exact date, but estimated it was probably a month ago.

SEN. MANGAN asked the same question of **Mr. Braun** who had the same response to both questions as **Mr. Ohler.**

SEN. MANGAN then asked the same questions of **Mr. North,** who responded he did not oppose the bill in House and made the decision at the end of February to oppose the bill.

SEN. MANGAN asked the same question of **Ms. Pfeifer** who responded she attended the House hearing and watched the bill.

SEN. MANGAN asked **Mr. Smilie** the same question, and he responded he did not oppose the bill in the House, but pointed out it would have been better if the Chief Legal Counsel of all the agencies and the Attorney General's Office had an opportunity to discuss the bill prior to it being introduced.

SEN. MANGAN asked **Mr. Tuttle** if he opposed the bill at the House hearing, and **Mr. Tuttle** responded he did not oppose the bill in the House and decided to oppose the bill about one month ago.

SEN. MIKE WHEAT asked **Mr. Tweeten** if it is possible for the Attorney General's Office to appoint an attorney from another agency to be deputy attorney general to represent the Attorney General's Office in the bankruptcy court so there are no payments made by the agency to the Attorney General's Office.

Mr. Tweeten responded almost every attorney working for an agency is designated as a special assistant attorney general for the purposes of conducting the legal business of the agency they work for. There are two mechanisms for funding representation of an agency. One is a contingency basis, where representatives of both the Attorney General's Office and the agency sit down and agree on a percentage of the fee recovered. The second way the funding takes place is through an interagency agreement between the agency and the Bankruptcy Unit. The Bankruptcy Unit currently charges $70 an hour, and is due to be raised to $72.50 on July 1. The Bankruptcy Unit bills hourly just as outside counsel would.

SEN. WHEAT asked Mr. Tweeten to respond to concerns raised by the agencies that their current staff is capable of representing the agencies in a more cost-effective manner and possess the specific knowledge regarding the agency they represent.

Mr. Tweeten stated there are opportunities to reduce any potential for overlapping. **Mr. Tweeten** also stated the electronic transfer of data would alleviate the need to copy and fax files. **Mr. Tweeten** stated there is an opportunity to create flexibility in how the Bankruptcy Unit relates with a particular agency built into the bill. Arrangements will need to be made between the agency and the Bankruptcy Unit to eliminate inefficiencies while maintaining the efficiencies of having a centralized unit.

SEN. WHEAT understood the purpose of the bill to be an attempt to develop efficiency by having a centralized unit do the bankruptcy work.

Mr. Tweeten agreed that was the exact purpose of the bill.

SEN. WHEAT inquired about out-of-state bankruptcies and if agencies have special ability to get local counsel that the Attorney General's Office does not have, or could the Attorney General's Office perform that function just as well as the agency.

Mr. Tweeten replied they could retain out of state counsel just as well or better than the agencies because they have access to the National Association of Attorneys General which contains a network of state bankruptcy units around the country. **Mr. Tweeten** stated that in the W. R. Grace case there are claims made by various state agencies. In coordinating the claims of all these agencies, they have identified and retained outside counsel in the locale of the bankruptcy court.

SEN. WHEAT asked if any of the agencies are representing themselves in the W. R. Grace case or if the Attorney General's Office is representing all the agencies.

Mr. Tweeten stated there is a working group which has representation from all the agencies. They are providing direct representation to the Risk Management and Tort Defense Division and the Department of Health and Human Services. The Department of Environmental Quality is being represented by their in-house counsel.

SEN. WHEAT asked **Ms. Pfeifer** how much DPHHS pays to outside counsel when they have to hire outside counsel.

Ms. Pfeifer replied they do not hire outside counsel. In the past when they have had appearances in Bankruptcy Court, they hire the Attorney General's Office. This does not happen very often. In most of the cases they have, it is not necessary to hire the Attorney General's Office to review and file the claim.

(Tape : 2; Side : A)

SEN. BRENT CROMLEY read Section 2-15-501 and wondered if **Mr. Tweeten** was aware of a case where someone other than the Attorney General's Office has represented the state and there has been a disqualification motion made.

Mr. Tweeten was unaware of that issue being raised against state counsel appearing in a bankruptcy proceeding.

SEN. CROMLEY then asked if **Mr. Tweeten** was aware of any opinion generated with regard to the ability of any agency other that the Attorney General's Office to represent the state.

SEN. CROMLEY asked if this bill were to pass whether there would still be use of agency counsel in what may be a high volume of no asset bankruptcy matters.

Mr. Tweeten felt that was a possibility and explained further that the Bankruptcy Unit would need to have notice of the existence of those cases. This is important because there are unresolved issues of law in the world of bankruptcy regarding the effect of state agencies appearing in bankruptcy court on waivers of sovereign immunity for purposes of cross-claims or counterclaims that anyone in the bankruptcy may want to bring against the state. **Mr. Tweeten** feels it is very important that there is a central clearinghouse for the presentation of bankruptcy claims. In the W. R. Grace case, it became apparent there was a tension, if not an outright conflict, in some of the positions which were going to be advocated in the bankruptcy by the Tort Claims Division on the one hand, and DPHHS on the other. They worked hard to make sure the potential for that conflict was minimized. If the Bankruptcy Unit does not know about the claims, then they never have the opportunity to resolve and mitigate potential conflicts.

SEN. AUBYN CURTISS did not see anything in the bill which would require new counsel if the bill were to pass. **SEN. CURTISS** wanted to know if new counsel would have to be hired to cover additional responsibilities if the bill passes.

Mr. Tweeten feels the Bankruptcy Unit can absorb whatever work is brought. If the volume of work justifies it in the future, they will come before the Legislature and ask for additional authority to hire additional attorneys. Additional recovery of funds by the Bankruptcy Unit for the benefit of the state would be enough to cover the cost of hiring additional counsel, but they do not planning on hiring.

Closing by Sponsor:

Rep. Harris closed by stating a potential conflict between the Governor and the Attorney General has never happened before. In fact, it is highly unlikely a conflict would occur, because the objective is to obtain as much money as possible to maximize the amount of revenue coming to the department bringing the claim.

Testimony from the DOC demonstrates the issue being presented since they would rather have their own attorneys handle their cases, even though they have no experience in bankruptcy. **Rep. Harris** feels this is not an efficient use of the attorney's time. In response to the argument that the agencies cannot afford to hire the Attorney General's Office, **Rep. Harris** stated the Bankruptcy Unit should have been funded out of the general fund. Testimony of DEQ is illustrative of the problem in that they would rather hire outside counsel in Reno, and that expenditure is okay, but it is not okay to pay the Bankruptcy Unit of the Attorney General's Office. In order to be efficient and effective, this bill needs to be passed. Current law states if the state has an interest, the Attorney General is to represent the state agency. For the reasons above, and the fact none of these issues were brought up in the House, **Rep. Harris** feels this bill should pass. Regarding child support enforcement, if there is a more efficient way for federal bankruptcy attorneys to handle claims on behalf of the agency, an amendment could easily be proposed. In closing, **Rep. Harris** stated it ought to be the Bankruptcy Unit that represents the State of Montana in a bankruptcy case.

HEARING ON HB 40

Sponsor: **Rep. Brad Newman, HD 38, Butte.**

Proponents: **Pam Bucy, Department of Justice**
Ken Dove, Montana Police Protective Association
Jim Smith, Montana Sheriffs' and Peace Officers' Association, Montana County Attorney's Association
Mark Tymrak, Montana Association of Chiefs of Police, and City of Bozeman

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Newman is bringing HB 40 at the request of the Department of Justice. **Rep. Newman** explained HB 40 deals with an investigative stop and a stop and frisk. The reason for the bill is because the Montana Supreme Court invited the bill to be brought in a case entitled State v. Krause, a DUI case from Beaverhead County where the Montana Supreme Court looked at 46-5-401 dealing with investigative stops, and 46-5-402, dealing with stops and frisks. **Rep. Newman** explained the facts of the Krause case and the ruling of the Montana Supreme Court which suppressed statements Mr. Krause had made to law enforcement about where he had been and

his consumption of alcohol. The court noted that in Montana, in order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle which is observed under circumstances that create a particularized suspicion that the person of the vehicle is committing, has committed, or is about to commit an offense. There are several different standards police officers use in their investigation, the first being a particularized suspicion. An officer may stop a person for investigative purposes having a particularized suspicion, but cannot arrest the person until there is reasonable cause. The second statute, which deals with investigative stop and frisks, is Section 46-5-402. In the stop and frisk context, Rep. Newman is talking about a lawful stop, and personal contact with the driver or occupant of the vehicle, and in the need to protect the safety and security of others, the officer may frisk the person. This is called a "Terry stop," which is named after a case entitled Terry v. Ohio. This will allow the officer to frisk to ensure the person is not carrying any weapons or objects which would put the officer or others in the area at risk. In Section 46-5-402(4) it says an officer "shall inform the person, as promptly as possible under the circumstances and in any case before questioning the person, that the officer is a peace officer, that the stop is not an arrest but rather a temporary detention for purposes of an investigation, and that upon completion of the investigation, the person will be released if not arrested." The Montana Supreme Court looked at the language and said the statements made by the DUI driver must be suppressed because it is an investigative stop. Because of this language, the Supreme Court has said the incriminating statements had to be suppressed. In the context of a case where there is no frisk, this creates a problem. The Supreme Court did say in Krause that it suspected this was not the intent of the legislature, it was nevertheless how the statute reads. The problem exists because there is a stop and frisk statute that also applies to an investigative stop statute because of the language past legislatures have used. HB 40 will combine both the investigative stop and the stop and frisk statutes, so it will be clear for the officers to understand and it is clear as to what the intent is in these investigative stop situations. Rep. Newman asked the Committee to note that they are proposing to eliminate the requirement in subsection (4) in 46-5-402 about the officer saying he/she is a police officer and this is an investigative stop and you will be either arrested or released after this stop.

Proponents' Testimony:

Pam Bucy, representing the Department of Justice, stated the bill is also requested by all of the law enforcement community. This

was the number one problem discussed with law enforcement during the interim. After the Krause case, in every single minor traffic stop, the motorist is given this warning. This is very frightening for a motorist to receive that type of warning in a traffic stop and it is unnecessary since the language was designed for a frisk situation. Ninety percent of traffic stops never ripen to that situation. This bill will more accurately reflect what happens in a traffic stop. A frisk will only occur if an officer fears for his safety. **Ms. Bucy** urged the Committee to pass the bill.

Ken Dove, representing the Montana Police Protective Association, urged the Committee to support HB 40.

Jim Smith, representing the Montana Sheriff's and Peace Officer's Association and the Montana County Attorney's Association, testified it has been difficult since the Krause decision for officers on the street. **Mr. Smith** hopes this law will meet with favor from the Supreme Court the next time a case reaches that venue.

Mark Tymrak, President of the Montana Association of Chiefs of Police, and the Director of Public Safety for the City of Bozeman, urged the Committee to support HB 40.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. DAN McGEE stated when he gets pulled over, he wants to know why he is being pulled over. He is concerned that the bill will remove the provision for letting the person know why he is being pulled over. The individual getting pulled over is already scared, and now the officer will not have to let them know. **SEN. McGEE** feels this could create a conflict situation between the person being pulled over and the officer.

Rep. Newman respectfully disagreed with **SEN. McGEE's** analysis and stated the intent is to lessen the conflict between the officer and the motorist. Very few people are arrested in a traffic stop. A citation will be issued and the motorist is free to leave. Most motorists do not believe they are going to be arrested. Since the Krause case, in each case, the officer has to state his reason for stopping the motorist. The intent of the bill is to allow the officers to be much more informal and cordial with the suspect rather than confrontational.

(Tape : 2; Side : B)

SEN. GARY PERRY asked if there is any other place in statute that requires the officer to inform the driver why the stop is being made.

Rep. Newman replied it is a matter of police practice not a statutory requirement. Obviously, law enforcement wants to be as efficient and effective as possible. The more information they give a person, the more it de-escalates a situation. By putting this in statute, the Supreme Court will read it has a matter of statutory right and if it is not done according to statute, the court will hold law enforcement to that standard. This was not the intent of the investigative stop statute. The Supreme Court even noted that in its decision, but stated until the language is changed, law enforcement will have to live with it.

SEN. JERRY O'NEIL thinks it is silly for a uniformed police officer, in a traffic stop, to have to tell someone he is a police officer. He wonders if a plain clothes officer would have to inform someone that they are a police officer.

Rep. Newman stated as a matter of good police practice, the officers do inform members of the public that they are police officers. In the Krause case, evidence was suppressed because the officer did not follow all the provisions of 46-5-402(4). As a matter of practice, the officer will identify himself, but if you elevate it to a statutory right, there will be consequences.

SEN. WHEAT appreciated what the court said, but wondered why they did not simply remove subsection (4) of 46-5-402, and why they chose to combine the statute with 46-5-401.

Rep. Newman stated he did not draft the bill, but feels it was to streamline the approach so police officers, as well as the court, would clearly understand what was required up front by statute and what their duties and obligations are. Also, the Supreme Court noted there was confusion by having two separate statutes.

SEN. WHEAT stated, in his mind, there is a difference between an investigative stop and frisking someone. In **SEN. WHEAT's** mind, they are clearly two different things, and he is wondering why they are being combined into one bill.

Rep. Newman stated they are proposing to reduce this to one statute where subsection (1) covers the investigative stop scenario, and subsections (2) and (3) now cover the stop and frisk. It would have been equally effective to leave the investigative stop statute as it was, and simply amend the stop and frisk statute. The key was to be sure they did not impose

artificial requirements or create a statutory right when they were really just talking about good police practice.

SEN. McGEE asked why they would not want to, immediately upon a stop, inform the individual why they are being stopped.

Rep. Newman replied that is exactly what does happen. The question is do we want to elevate that to a statutory right and duty as opposed to good police practice. This is what the officers are trained to do at the academy. If it is a statutory requirement and it is not given, a clearly guilty person could avoid prosecution.

SEN. McGEE appreciates what **Rep. Newman** said, but as a policy maker for the state of Montana, and representing the people of Montana, there is a balance. **SEN. McGEE** asked if they could be sure every law enforcement officer employs good police officer practices.

Rep. Newman answered he believes so, and does not believe the statute will change that since the person has all the constitutional rights afforded to him.

SEN. McGEE asked **Officer Dove** what he says to the driver when he pulls him over.

Officer Dove stated there is anxiety when a person is pulled over, not only for the driver, but for the officer approaching the car. As a practice, the officer will try to relieve that stress factor, which includes advising the person why they were stopped. Therefore, as a matter of practice and safety, they will identify the problem up front to reduce the stress factor.

CHAIRMAN GRIMES asked when an investigative stop is performed because of a particularized suspicion, and then the officer performs a frisk, what standard is the peace officer proceeding under. By joining the two statutes, does it create a loophole.

Ms. Bucy does not think that is the case at all. To expand, the purpose for putting them into one statute is that this more accurately reflects a traffic stop. First, the officer has to have particularized suspicion, meaning they have to see something wrong with someone's driving. In order to frisk someone, the courts have all said that an officer has to have reasonable apprehension for their safety. These are very separate issues. A stop may ripen into a frisk. **Ms. Bucy** feels it is important to have these together because they accurately reflect what happens in a traffic stop. A frisk can be challenged under statute regardless.

CHAIRMAN GRIMES stated if the situation does not ripen, but the officer frisks anyway, there are other laws they would be subject to.

Ms. Bucy agreed stating there are other rights available to challenge a search.

SEN. McGEE stated there are two sides to this coin. His dearest friend was a deputy sheriff in Missoula and pulled a car over at 2:30 a.m. for driving away from a gas station without paying for $12 of gas. What the officer did not know because the computers were down, was there had been a car stolen, a gun stolen, and the guy had sworn earlier he would kill a cop that night. **SEN. McGEE** is sympathetic to the officer. Second, **SEN. McGEE** used to be a deputy sheriff, and knows what it is like to make a stop. He also knows what it is like to be pulled over and not be told why. The language states a peace officer who has lawfully stopped, which is a presumption, "demand the person's name and present address, an explanation of the person's actions, and, if the person is in a vehicle, the person's driver's license and the vehicle's registration and proof of insurance". So far, no one has told this individual why he has been pulled over. Good practice may indicate they have been told, but there is nothing mandatory. **SEN. McGEE** feels there should be a statement in the bill which requires the officer to tell the person up front why they are being pulled over. **SEN. McGEE** feels this would defuse controversial situations.

Rep. Newman responded that in the investigatory stop context, the officer can already do that. There is not a presumption the stop is lawful, that is a requirement. If the stop is not lawful, the defense can challenge the stop.

SEN. McGEE interjected and agreed that was true, but rebutted it is a presumption the stop is lawful, because the person was stopped. To prove it was not, it would have to go to court.

Rep. Newman went on to say an officer can demand the information and an explanation of a person's whereabouts. This information is already allowed under existing statute. The problem is because of the language of Section 46-5-402, which refers not only to the stop and frisk information, but also to 46-5-401, the investigative stop. The Supreme Court has said the language also applies to the investigative stop and until it is changed, they will read the language strictly and law enforcement will need to abide by it.

CHAIRMAN GRIMES noticed under the existing 46-5-402, the stop and frisk section could be used if an officer has stopped someone

under section 401 or this section. **CHAIRMAN GRIMES** noticed the bill says if an officer stops someone under this section. **CHAIRMAN GRIMES** wondered what if there were other cases where you would want to do a stop and frisk which does not involve observed particularized suspicion, and whether this law could be applied.

Rep. Newman does not see a problem with either of these situations. The officer will need the particular suspicion to detain the person. Regarding the frisk, if an officer has a particular or reasonable apprehension the person may be armed, that is where the frisk comes into play. In either situation, the officer is not free to simply stop a person for no reason, and there needs to be suspicion. This is one of the reasons they have chosen to combine the two statutes.

CHAIRMAN GRIMES believes if the court found the current language problematic, they could potentially find the observed and circumstances qualification problematic as well.

Closing by Sponsor:

Rep. Newman believes this is a problem that needs to be looked into and the vast majority of the stops are traffic stops. Previous legislative bodies have imposed stop and frisk requirements on investigative stop situations. This leads to escalated tension between the office and the person being stopped. **Rep. Newman** asked for the Committee's careful consideration.

(Tape : 3; Side : A)

HEARING ON HB 155

Sponsor: **Rep. Larry Jent, HD 29, Bozeman.**

Proponents: **Janice Doggett, Chief Legal Counsel for the Secretary of State**
Robert Throssel, Montana Association of Clerks and Recorders

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Jent stated HB 155 passed the House on a 100-0 vote. The bill arose from the Supreme Court's decision regarding the 2000 presidential election. In that case, the U.S. Supreme Court halted a court-ordered recount in Florida because it determined the procedures and process for recounting the vote did not ensure

equal protection of laws for voters who were similarly situated in different precincts, different counties, and different political subdivisions of the state of Florida. After the case of Bush v. Gore, most states, including Montana, established study commissions to determine the effects of, and procedures to deal with, that landmark decision. Rep. Hal Jacobson introduced a resolution which was referred to the State Administration and Veteran Affairs interim committee to study the voting systems used in this state and to come up with a bill. Congress proposed and enacted the Help American Vote Act. HB 155 contains provisions of that Act. **Rep. Jent** explained there are several new sections to the law, including the appointment of counting boards. Section 2 has to do with the uniformity in counting votes. The key provision of that section is lines 21-23 on page 3. The interim committee directed the Secretary of State to adopt rules, but did not try to micro manage the Secretary of State due to his expertise and changing technology. Section 7 directs the Secretary of State to adopt rules defining a valid vote for each type of voting system. The Secretary of State is also directed to adopt uniform procedures for using voting systems. The Help America Vote Act requires performance certification. This means the election administrator will test the equipment and determine if they are working properly. The new sections make sure there are uniform procedures for the adoption of voting systems, for their performance and for counting ballots under those systems.

Rep. Jent explained the Secretary of State will have a duty to advise, assist, and train, including school board elections, with no additional costs to the school districts. New terminology is adopted which includes use of the term "voting system" versus the term "machines" and "devises." The term "printing" is replaced with "preparing." Section 22 speaks of ballot form and ballot uniformity and state wide rules regarding uniformity. Section 24 is another requirement of the Help America Vote Act and has to do with correcting the ballot. Section 29 states the Secretary of State will provide a consistent way of recording the number of votes and ballots. **Rep. Jent** submitted a Poll Book as **EXHIBIT(jus51a04)**. Section 30 requires paper ballots be marked instead of stamped, since mail ballots cannot be stamped. Section 31 will require a person with a spoiled ballot must be provided with another ballot. Section 32 allows for a voter to vote absentee only by paper ballot. Sections 36 and 37 must be reconciled with HB 201, which will take all the military and overseas voting and placed them in HB 201. Section 43 has to do with the duties of the election judges and the Poll Book and reserving numbers for electors who may vote late under Section 13-13-211(2). Section 52 has to do with mandatory accounting board procedures and allows election officials to begin counting

ballots before voting is concluded. A person on the counting board may not discuss the results of the early counting of votes while the polls are open. Section 56 deals with the criteria for a recount. Sections 57 through 60 tells elections officials how to perform a recount. **Rep. Jent** stated the committee rejected picking a uniform system because there are 26 counties in Montana that still use paper ballots, 20 counties that use optical scan, and the remainder used punch cards, which are now eliminated. Election officials can choose the voting system subject to approval by the Secretary of State. The criteria for choosing a voting system are contained in Section 65. Sections 78 and 79 have to with question ballots and signature procedures on mail ballots only.

Proponents' Testimony:

Janice Doggett, Chief Legal Counsel for the Secretary of State, worked with the interim committee to draft this bill. The Secretary of State's office intends to adopt rules, and not to operate in a vacuum. They have a task force of elections administrators to help draft rules, and they will to through the rulemaking process. They have representatives from counties which use each type of ballot.

Robert Throssel, representing the Montana Association of Clerks and Recorders, stated the Clerks and Recorders Association participated in the interim study. Problems can happen in any county and in any election. This bill will take what has been done informally and put it into a uniform system. People will not vote in the same manner, but the ballots will be treated the same. There will always be ballots that are questionable, and HB 155 will set up the framework to address those questions in a uniform manner.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. WHEAT inquired if there was a fiscal note, and **Rep. Jent** replied there was not. Upon request from **SEN. WHEAT, Rep. Jent** explained HB 548 establishes a special revenue account to pay for replacement of the punch cards. That money is available from the federal government. There will be a line item in HB 2 which authorizes the Secretary of State to spend the money. Because HB 155 does not mandate replacement of machines, it does not have a fiscal note. There is a fiscal note attached to HB 87.

SEN. WHEAT reviewed the bill and it appears to him there will be a lot of responsibility flowing out to the election

administrators and clerks and recorders. He inquired if there was any money available under the federal act which will be helping the counties to implement all the changes.

Ms. Doggett replied much of the federal funding will be used by the counties. In addition, there will be a five percent match from the Secretary of State's office.

SEN. WHEAT asked if it was fair to say most, if not all, the changes in HB 155 are mandated by the federal act.

Ms. Doggett responded HB 155 preceded the federal act. Every piece of the bill grew out of the concerns in Florida and the equal protection questions in Gore v. Bush. Not all of the provisions of the bill were mandated by the Help America Vote Act.

Closing by Sponsor:

Rep. Jent followed up on **SEN. WHEAT's** questions and stated there were two series of federal payments to the state. There is early out money to help improve elections, which will be administered by the General Services Administration, and the Chief Election Official must certify within six months of enactment that the state will use the money to improve elections. They were directed to establish a federal special revenue account so there would be a place to put that money when it became available.

HEARING ON HB 199

Sponsor: **Rep. Christopher Harris, HD 30, Bozeman.**

Proponents: **Pam Bucy, Department of Justice**
Ken Dove, Montana Police Protective Association
Mark Tymrak, Montana Association of Chiefs of Police, City of Bozeman
Jim Smith, Montana Sheriffs' and Peace Officers' Association, Montana County Attorneys' Association

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Harris explained the options for a patrol officer making an arrest. This bill will add another tool to the officer's options. With the driver's permission, the officer can take the

license, in lieu of bail, give the driver a temporary license, and notify the driver of where to appear in court. This is the practice in 30 other states, and this has been successful in securing the appearance of the driver in court.

Rep. Harris noted the $25 administrative fee on page 3, line 13, is appropriate, but he feels the fee should not apply if the driver is found to be not guilty.

(Tape : 3; Side : B)

Proponents' Testimony:

Pam Bucy, representing the Department of Justice, explained the history of the bill and explained the non-pay or appear program has been around since 1995. **Ms. Bucy** submitted written testimony in favor of HB 199. **EXHIBIT(jus51a05). Ms. Bucy** feels this will not only be a tool for law enforcement, but for motorists as well. This will cut down substantially on law enforcement officers having to serve warrants.

Ken Dove, representing the Montana Police Protective Association, supports the bill and urged a do pass.

Mark Tymrak, President of the Montana Association of Chiefs of Police, and the Director of Public Safety for the City of Bozeman, supports HB 199.

Jim Smith, representing the Montana Sheriffs' and Peace Officers' Association and the Montana County Attorneys' Association, testified that both organizations support HB 199 because it gives law enforcement a good, workable tool that will motivate people to show up for their court appearance and pay their fines.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. McGEE asked **Rep. Harris** if he had discussed the language of his proposed amendment with **Valencia Lane.**

Rep. Harris responded he had discussed the amendment with **Ms. Lane.**

Closing by Sponsor:

Rep. Harris closed the hearing on HB 199.

HEARING ON HB 134

Sponsor: **Rep. Sandy Weiss, HD 13, Billings.**

Proponents: **Diana Koch, Chief Legal Counsel,**
Department of Corrections
Rhonda Schaffer, Fiscal Bureau Chief,
Department of Corrections,
Mike Mahoney, Warden, Montana State Prison

Opponents: **None.**

Opening Statement by Sponsor:

Rep. Weiss is carrying HB 134 on behalf of the DOC. **Rep. Weiss** explained HB 134 revises the accounting system of the DOC and addresses two issues: inmate welfare funds and inmate trust accounts. Rep. Weiss explained inmate welfare funds are generated by inmate commissary purchases and money generated from the facility telephone contracts. The funds are used as gate money up to $300 that an inmate receives when they leave the institution, institutional projects at prisons, family death bed visits or travel for a funeral. Each facility is responsible for accounting for these funds and each facility inmate's counsel decides how to spend the money, with the warden having veto power. Currently, the funds are maintained in six separate facilities around the state. Consequently, there is no consistency from facility to facility. Since there are fewer women in the women's prison, and women tend to buy less from the commissary, they tend to accumulate less money. If the accounting method is changed and the DOC administers the funds, there will be consistency and equity among the facilities. Wardens will be able to exercise more guardianship power to help inmates decide how to spend the money to the betterment of the inmate population.

Rep. Weiss explained the inmate trust account, money that a prisoner earns working at the prison or money an inmate receives from outside sources, should be monitored by the DOC. This will make it more difficult to inmates to engage in illegal transactions. The bill will allow the DOC to clarify and establish the priorities of deduction from inmate accounts, deduct dollars for child support, restitution, or court and prison ordered fees and costs. DOC has a plan for administrative rules which will provide a basis for taking a percentage of money from an inmate's account every month, and pay that money to child support, victims, or fines.

Proponents' Testimony:

Diana Koch, Chief Legal Counsel for the Department of Corrections, explained there are two different types of money which the bill deals with. Regarding inmate accounts, the current statute says DOC will take everything in an inmate's account over $200. Inmates are not stupid on this issue and will make sure there is nothing in their accounts over $200. This bill will remedy the situation by saying it does not matter how much money is in your account, we are going to take a certain percentage. Therefore, an inmate with a financial obligation will pay every month. There is a Supreme Court opinion, which was unpublished, that deal with taking restitution out of an inmate's account. In a dissenting opinion by Justice Trieweiler, he stated there was no statutory authority to take any money out of an inmate's account to pay toward restitution to victims. Justice Trieweiler accused the Department of Corrections of removing money from inmates' accounts illegally. This bill will give the Department of Corrections that statutory authority. The other funds the bill deals with come from commissary and the telephone contracts. Currently, DOC accounts for the money using a trust theory. The money either has to go into the general fund and is accounted for as a trust. This removes flexibility from the way the wardens can use the money. The bill proposes to account for this money differently to give the wardens more flexibility in using this money to benefit the inmates as a whole.

Rhonda Schaffer, Fiscal Bureau Chief for the Department of Corrections, stated HB 134 will accomplish two things. It will set a priority of deductions for individual inmate accounts. This will allow DOC to use a consistent set of deduction criteria for each inmate. **Ms. Schaffer** submitted a flow chart depicting the deduction process **EXHIBIT(jus51a06)**. Previous language allowed deductions for balances over $200. The new language will allow deductions each time an offender receives regular revenue. DOC will adopt administrative rules to provide a basis to consistently garnish offender income owed to victims, children, and the government. The net activity of the inmate trust accounts and the inmate welfare fund are recorded at the end of each year in a trust account. Section 3 of HB 134 will take the inmate welfare money and place it in a special revenue account on the state-wide budgeting and accounting system. This will mean all the spending activity and revenue will be tracked on the state's general ledger system. They are asking for a special revenue account since the amount will constantly change depending on the number of inmates and the revenue they have.

Mike Mahoney, Warden, Montana State Prison, feels there are three key points to the bill. First, it provides continuity to the inmate welfare fund in terms of its practical application with three regional prisons, a private prison, and two state-operated prisons. This will create uniformity in how these funds are utilized for the benefit of the inmate population. The second key component, as previously mentioned, is the bill will enable the department to invoke rules and supervision of the fees in such a manner as to minimize extortion and "bulldogging" among the inmate population. This is a key security issue for management at each facility. Thirdly, it will enable the department to put into place a mechanism where they can initiate a process where members can begin paying on court-ordered fines, restitution, and child support. The $200 cap is ineffective as the inmates will make sure they do not have over $200 in their account. Although **Warden Mahoney** does not believe "bulldogging" can be eliminated, this will certainly help control it.

Opponents' Testimony: None.

Questions from Committee Members and Responses:

SEN. CROMLEY asked **Diana Koch** where the inmates' money comes from and whether there was a maximum amount they can have in an account, and if an inmate could have an account that they are unaware of. In addition, **SEN. CROMLEY** wanted to know how they arrive at the percentages.

Ms. Koch informed **SEN. CROMLEY** there is no maximum amount an inmate can have in an account. Most prison jobs pay $1.29 per day. There are some jobs in prison industries that pay more. The amount of money an inmate earns is quite minimal. Sometimes, they have money coming in from outside sources, such as veteran disability or relatives. There are statutes that say inmates are not allowed to have outside accounts, and they are trying to find those outside accounts and close them down. In addressing the percentages, **Ms. Koch** stated there was a committee within DOC that worked on developing the percentages. The result was the system depicted on Exhibit 6. If an inmate is indigent, DOC has to provide certain items such as toiletries, stamps, and legal materials.

(Tape : 4; Side : A)

SEN. CROMLEY does not see any limits set in the bill, and he sees that all an inmate's money could be taken.

Ms. Koch explained the bill says DOC can take money according to administrative rule. DOC anticipates enacting these percentages in administrative rule after public comment and public hearing.

SEN. MANGAN understands the need for the special revenue account, and asked **Ms. Schaeffer** to explain the need for the statutory appropriation and how that will work for the inmate welfare account.

Ms. Schaeffer explained the statutory appropriation that would be used and any expenditures that would go through the account would be approved by the Warden. These expenses could include items such as a new gym floor or funeral expenses.

SEN. MANGAN stated they are setting up a special revenue account for that money, which, he assumes, the DOC will have access to. **SEN. MANGAN** is struggling as to why they need a statutory appropriation as well as a special revenue account.

Ms. Schaeffer re-referred the question to **Ross Swanson, Administrator for Montana Correctional Enterprises**, who testified he believes the statutory appropriation for the special revenue fund is similar to what they do for their proprietary funds. Basically, they get authority from the legislature that allows them to expend the monies against that. In this case, there will be an amount of authority, and as expenditures are made, it will go against that expenditure and be tracked.

SEN. MANGAN asked about the trust account system, commenting that he feels it is wonderful to see that child support is paid, and wondered how that money is then paid.

Ms. Schaeffer explained that currently there is a separate system that keeps track of that money, and it is not through a state warrant. This is part of their proposal.
SEN. MANGAN asked if the payment made to the third party from the inmate trust account would be made by a state warrant.

Ms. Schaeffer explained that is a separate system and has separate checks.

SEN. MANGAN asked where the money from canteen purchases and inmate telephone use is currently kept.

Ms. Schaeffer replied the money is kept in the bank account recorded on the state treasury and is called a trust account and is an 07 account rather than an 02 account.

Closing by Sponsor:

Rep. Weiss stated everyone has to be responsible for their actions, even if a person is incarcerated. The changes made to the law in HB 134 head in that direction. **Rep. Weiss** asked for a do pass recommendation from the Committee.

EXECUTIVE ACTION ON HB 161

Motion: SEN. MANGAN moved **DO CONCUR ON HB 161.**

Motion: SEN. McGEE moved the **amendment HB016102.avl BE ADOPTED. EXHIBIT(jus51a07).**

Discussion:

Ms. Lane explained the amendment provides for written waiver be signed upon the advice of an attorney. The amendment also strikes language on line 16 which is redundant with language on line 27.

Vote: SEN. McGEE's motion **TO ADOPT amendment HB015102.avl carried UNANIMOUSLY.**

Motion: SEN. MANGAN moved **DO CONCUR AS AMENDED ON HB 161.**

Discussion:

SEN. PERRY asked if there was a provision for a youth to sign a waiver without the advise of an attorney.

Ms. Lane explained that as the statute currently reads, it requires the advice of an attorney before waiving the right to a hearing. In speaking with **Diana Koch** of the Department of Corrections, **Ms. Koch** explained she was routinely asked to speak with youth when that youth was about to waive rights. **Ms. Lane** feels it is an important decision to waive a right to a hearing and, therefore, the youth is not allowed to waive that right without speaking to an attorney.

Vote: SEN. MANGAN's motion **HB 161 BE CONCURRED IN AS AMENDED carried UNANIMOUSLY. Senator Zook** will carry the bill on the Senate floor.

EXECUTIVE ACTION ON HB 134

Motion: **SEN. MANGAN** moved **HB 134 BE CONCURRED IN.**

Motion: **SEN. CROMLEY** moved **amendment HB013402.ajm BE ADOPTED. EXHIBIT(jus51a08).**

Discussion:

Ms. Lane explained the amendment is a coordination instruction prepared by **John McMaster. Mr. McMaster** sent a message stating **Rep. Raser** will want this amendment because HB 134 conflicts with HB 453. **Ms. Lane's** understanding is that **Ms. Koch** has seen the amendment and has agreed to the amendment.

CHAIRMAN GRIMES indicated the amendment adds an inmate's medical and dental expenses, as well as costs of incarceration.

Ms. Koch reviewed the amendment, stated she had discussed the amendment with **Rep. Raser**, and agreed this would be a good amendment.

Ms. Lane explained this is a coordination instruction and New Section 5 states the coordination instruction only takes effect if both bills pass. If both bills pass, it would not be possible for the Code Commissioner to codify the two bills without conflict. This will take care of that conflict.

Vote: **SEN. CROMLEY's** motion that **amendment HB013402.ajl BE CONCURRED IN carried UNANIMOUSLY. Note: Amendment HB013403.avl** was delivered to the Committee Secretary later that afternoon. **EXHIBIT(jus51a09).**

Motion: **SEN. CROMLEY** moved **HB 134 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. CROMLEY understands that they are taking it on faith that the rules will limit the deductions. As he reads the statute, everything could be taken out for service costs or DOC sanctions.

Ms. Koch explained the administrative rules have to go through the public comment process and public hearing process. It will not be possible for DOC to pass administrative rules that will abrogate the intent of the Legislature. It is somewhat a measure of faith, but it is more a measure of the rulemaking process.

SEN. CROMLEY did not see any intent to limit in the bill. **SEN. CROMLEY** sees the intent to take funds, but no intent to limit the amount being taken.

Ms. Koch stated if it is possible to insert more language into the bill to clarify the intent, she would consider it a friendly amendment.

CHAIRMAN GRIMES asked she would approve of language being inserted on page 2, line 20, inserting "a portion of the".

Ms. Koch agreed that proposed amendment would clarify the intent.

SEN. McGEE asked if the proposed rules would be presented to the Law and Justice Interim Committee.

Ms. Lane added that Legislative Services staff reviews all rule proposed by an agency, and during the interim, a summary of those rules are given to the appropriate interim committees. If there are concerns, they discuss the rules with the agency.

Ms. Koch added the rules must be submitted to the bill's sponsor for review.

Motion: **SEN. CROMLEY** moved to insert "a portion of the" on page 2, line 20, following the word "use".

Vote: **SEN. CROMLEY's** motion **carried UNANIMOUSLY.**

Motion: **SEN. CROMLEY** moved **HB 134 BE CONCURRED IN AS AMENDED.**

Discussion:

SEN. O'NEIL asked if inmates can send money from their account to friends and family outside of the prison and how the money would be transferred. Also, **SEN. O'NEIL** asked if there was a charge for this service, and if the account accumulates interest.

Ms. Koch replied they can send money out of their account. Some inmates send money home or purchase books by mail. These are not interest-bearing accounts. The system has the ability to write the check when an inmate requests money be sent somewhere. There is no charge to the inmate for this service.

SEN. PERRY stated the bill talks about statutorily appropriated funds, and wanted to know how many dollars in funds it is referring to.

Ms. Koch believes what happens in the statutory appropriation is it is the amount they expect to come into the fund for the biennium. Ms. Koch quoted an amount of $358,210 as all the money held in trust for offenders in fiscal year 2002. This includes money in inmate accounts, as well as the inmate welfare fund. These funds are currently co-mingled, and HB 134 is attempting to separate these funds. The inmate offender funds is $260,000.

SEN. PERRY inquired if an inmate could have a checking account in a private bank outside of the prison.

Ms. Koch replied they are not supposed to have these accounts.

SEN. PERRY stated current law provides that in order to send money out of, or receive money at, the facility using the trust account system, there a limit to the sources from which money can be received from and deposited in the facility trust account system. **SEN. PERRY** would like to know if an inmate can have other funds be deposited in the trust account to pay for medical or dental expenses.

Ms. Koch replied if an inmate needs to have a bank account for other things, like a business they still operate for example, they need to get special permission from the warden to have an account on the outside. They will not take a percentage of all money that comes into the fund, because some monies will be exempt from collection. For instance, money received from the Native American Tribes will be exempt.

(Tape : 4; Side : B)

SEN. CURTISS asked about monetary sanctions imposed by a state prison.

Ms. Koch anticipates that if an inmate floods his cell and tears up his cell, there could be a monetary sanction levied to pay for the damage to the cell.

SEN. CURTISS realized the amounts for damages would vary, but asked if penalties would vary between facilities.

Ms. Koch explained the money they collected would be for damages. Typically, the amount assessed would be in excess of an inmate's ability to pay, so they would just collect a percentage. There are guidelines at the prisons for sanctions to make the offender more accountable.

Vote: SEN. CROMLEY's motion **HB 134 BE CONCURRED IN AS AMENDED carried UNANIMOUSLY.**

EXECUTIVE ACTION ON HB 299

Motion: **SEN. McGEE** moved **HB 299 BE CONCURRED IN.**

Discussion:

SEN. WHEAT submitted proposed amendment HB029901.avl, **EXHIBIT(jus51a10)**, which would place a period at the end of the word "negligent" on line 15, and strike the language "or engaged in intentional misconduct."

Motion: **SEN. WHEAT** moved **amendment HB029901.avl BE ADOPTED.**

Discussion:

CHAIRMAN GRIMES asked what happens when someone negligently leaves a gate open and a cow gets out and damages a wheat field. **CHAIRMAN GRIMES** asked for the legal and practical ramifications of leaving out "or engaged in intentional misconduct."

SEN. WHEAT explained that he and **Mr. Bloomquist** discussed that this primarily deals with neighbors who have common fences. This law as been on the books for over 100 years, but has only been interpreted by the Montana Supreme Court once. Animals crossing over from one property to the next will always cause problems. **SEN. WHEAT** feels taking out the language "or engaged in intentional misconduct" and leaving it in the realm of negligence, takes away the issue of having neighbors accusing neighbors of intentional misconduct. Negligence will normally be covered by insurance. Most farmers and ranchers have a general liability policy that covers negligence. This will take the dispute and put it in the hands of insurance adjusters and prevent neighbors from fighting. If you read through the Supreme Court's decision, it talks about negligence. Because of the way the statute was written, however, the Supreme Court had to interpret it as strict liability. By striking the language of intentional misconduct will accomplish what the Supreme Court was suggesting.

SEN. McGEE asked if someone did something with intentional misconduct, could they be prosecuted under criminal mischief.

SEN. WHEAT followed up that if it was an intentional act, not only could they be charged criminally, but they would not have any insurance coverage.

CHAIRMAN GRIMES commented that it is interesting that the whole issue surrounds domestic animals that break into an enclosure.

SEN. WHEAT explained the case talked about the open-range law, and this bill was drafted to enforce open range. With open range, if you do not want cattle coming onto your property, you had to fence them out.

Vote: SEN. WHEAT's motion **amendment HB029901.avl BE ADOPTED carried UNANIMOUSLY.**

Motion: SEN. CROMLEY moved **amendment HB029904.ads BE ADOPTED. EXHIBIT(jus51a11).**

Discussion:

Ms. Lane explained this was a title issue and was given to Ms. Lane by staffer Doug Sternberg and the House amended the bill on lines 17 and 18, but did not place the corresponding amendment in the title.

Vote: SEN. CROMLEY's motion that **amendment HB029904.ads BE ADOPTED carried UNANIMOUSLY.**

Motion/Vote: SEN. McGEE moved **HB 299 BE CONCURRED IN AS AMENDED.** The motion **carried UNANIMOUSLY. Sen. Bales** will carry the bill on the Senate floor.

Note: The new amendment HB029902.avl, **EXHIBIT(jus51a12)**, was delivered to the Committee Secretary following the meeting.

EXECUTIVE ACTION ON HB 166

Discussion:

Ms. Lane explained that **CHAIRMAN GRIMES** had asked her to put George Korn's amendment into proper form. This is amendment HB016601.avl, **EXHIBIT(jus51a13).** Upon **SEN. McGEE's** request, **Ms. Lane** explained this amendment is a major change to the bill because it will now apply to the rules of evidence as to what is admissible and what is not admissible. **Ms. Lane** believes evidence of prior crimes is usually not admissible and this would overturn that concept.

CHAIRMAN GRIMES stated the question is do they want the jury to hear all the prior offenses, related or not, or do they not want the jury to hear that. Although he understands the intent, **CHAIRMAN GRIMES** feels it will cut both ways and there could be times when the jury should probably not hear extraneous information.

SEN. CROMLEY stated currently the court has to decide if other charges are related sufficiently close in scope, time, and relevance and, if so, they are admitted. If they are unrelated and irrelevant, they are excluded. While he may not always agree with the court's decision, **SEN. CROMLEY** feels putting a wholesale amendment like this on bill will be constitutionally challengeable. **SEN. CROMLEY** expounded on the constitutional challenge could include the right to cross-examine witnesses and feels there might be a number of constitutional issues which could be brought into questions.

SEN. O'NEIL stated the court can hear all relevant evidence, except in dissolution cases. This would be an attempt to tell the court to hear the evidence regardless of whether it is relevant.

SEN. McGEE understood the argument to be if he pleads guilty to wearing a seatbelt, that issue is adjudicated and not before the court. This bill will require him to defend himself again even though he has plead guilty.

SEN. WHEAT responded and said by pleading guilty to not wearing a seatbelt, the issue is over, and the person can be punished under the law. The fact that person has pleaded guilty and will be punished, has nothing to do with whether a person was driving under the influence of alcohol. **SEN. WHEAT** does not like the amendment and feels it is opening a can of worms. **SEN. WHEAT** read the language from Rules of Evidence regarding admissibility of past crimes for proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. There are instances where the prosecutor can get evidence of other crimes admitted. This often happens with sex crimes. **SEN. WHEAT** feels the Rules of Evidence should continue to guide.

CHAIRMAN GRIMES commented about a crime committed in Lewistown and where the offender claimed innocence, but *The Great Falls Tribune* ran the guys criminal record since the 70s, which would lead people to believe the offender is guilty.

Motion: **SEN. McGEE** moved **HB 166 BE INDEFINITELY POSTPONED.**

Discussion:

SEN. McGEE commented that if the court is going to interpret the word "may" to mean "must," then he is confused as to what word to use to make language permissive. He does not want it in statute for that reason.

SEN. PERRY agreed because it is not really the bill, but the court ruling, that has far-reaching impact. He is uncomfortable with the bill and suggested the solution is for the Legislature to define "may" and "must."

SEN. O'NEIL feels by the court saying it "may" accept the plea, does not provide equal protection, meaning if it accepts the plea for one person, it has to accept the same plea for someone else. Otherwise, the court has discretion which it will sometimes use injudiciously. Using the word "must" provides equal protection.

SEN. WHEAT agreed. The court has said it provides discretion when one person wants to plead guilty, and the court says no, you have to defend yourself, and then another person is allowed to plead guilty. The bill says on equal protection grounds, if someone wants to plead, they can do it.

Motion: **SEN. McGEE** withdrew his motion to **INDEFINITELY POSTPONE.**

Motion/Vote: **SEN. WHEAT** moved **HB 166 BE CONCURRED IN.** The motion **carried 8-1** with **SEN. MANGAN voting no. SEN. WHEAT** will carry the bill on the Senate floor.

ADJOURNMENT

Adjournment: 12:30 P.M.

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SEN. DUANE GRIMES, Chairman

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CINDY PETERSON, Secretary

DG/CP

EXHIBIT(jus51aad)