MINUTES OF THE JUDICIARY COMMITTEE
February 18, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown at 8:04 a.m. in room 224A of the capitol building, Helena, Montana. All members were present as was Brenda Desmond, Staff Attorney for the Legislative Council.

HOUSE BILL 796

This bill is an act which creates a drug and alcohol abuse prevention grant program within the Department of Institutions to provide state grant funds derived from a surcharge on fines imposed for driving under the influence of alcohol and drugs.

REPRESENTATIVE KEMMIS, District 94, Missoula, stated that this bill is an attempt to take a different approach to the problem of drinking and driving and is one of three bills that he has introduced on the subject. He said that if they are going to get serious about the problem, they are going to have to go well beyond just getting tough about enforcement. He indicated that he has tried to establish some kind of a grant for educational purposes and this bill would establish a grant program for alcohol and drug abuse within the Department of Institutions, funding the program by a surcharge on DUI fines. He explained that the surcharge would be paid into the state treasurer; no more than 5 per cent of the funds of the program could be used for administrative costs of the program; grants could be given to state agencies, cities and counties, school districts and private individuals; the grants would be limited in their use for the payment of salaries and the purchase of training aids and other equipment directly related to the educational program. He continued that grants could also be used for advertising campaigns, which he felt were very effective. He also offered some proposed amendments to the bill. See EXHIBIT A.

LARRY MAJERUS, Administrator of the Motor Vehicle Division of the Department of Justice, testified that the experts in this field have long recognized that a broad approach is necessary and they strongly support this bill.

ALBERT GOKE, Administrator of the Highway Traffic Safety Division of the Department of Justice, indicated that the public at large has little knowledge of DUI laws and in a survey that was conducted at the Capitol Hill shopping center in Helena, it was found that one in fifty people did not know very much about the DUI laws. He testified that they support this bill.

CURT CHISHOLM, Deputy Director of the Department of Institutions, testified that they are excited about this new program; and this would create opportunities to enhance public awareness about the problems associated with not only driving under the influence of alcohol, but also as it relates to the behavioral and other social problems created by drug abuse.

MICHAEL WOOD, Director of Health Education for the Missoula City-County Health Department, gave a statement in support of this bill. See EXHIBIT B.

CANDICE COMPTON, an employee of the Alcohol and Drug Abuse Division of the Department of Institutions, testified that she works with people who have been drinking and driving and she also gives presentations throughout the state of Montana trying to prevent these problems. She urged the passage of this bill.

C. T. CANTERBURY, a consultant in the health services and health planning areas and previously the coordinator for the prevention services at the Department of Institutions, testified that this is the first time the state has taken an opportunity to recognize that prevention is a legitimate reason for legislation. He felt that the amendments would no longer give the Department of Institutions an obligation to take existing alcohol and drug abuse earmarked moneys and put those moneys into prevention; basically the approximately $60,000 fund from the surcharge is the only prevention money that the state of Montana will be providing. He emphasized if the department was not willing to take 6 per cent of these earmarked moneys, he would really question their committment towards prevention.

There were no further proponents and no opponents.

REPRESENTATIVE KEMMIS acknowledged that he thought that it was true that the bill, as introduced, would have some impact on changing the priorities of the Department of Institutions by putting more emphasis on prevention under the existing programs; and he felt that this was a very good idea; however, he did not want this bill to open up a squabble between prevention and treatment programs. He insisted that the intent of this bill and the intent of the amendments is to avoid that squabble.

REPRESENTATIVE DAILY informed REPRESENTATIVE KEMMIS that the committee had a bill yesterday that they amended and changed the penalties, and he wondered what would be the effect on this bill. REPRESENTATIVE KEMMIS replied that he did not believe it would have any except that any change in fines which actually increase collections, would increase the collections of this bill proportionately.

REPRESENTATIVE CURTISS noted that the amendments that are suggested make this primarily educational; and she wondered if it would not be more appropriate to put it in the Office of Public Instruction. REPRESENTATIVE KEMMIS replied that he considered this possibility at the onset, but he felt that one of the advantages of having it in the Department of Institutions is that there is already, at least by statute, a prevention function; so he thought it was legitimate in those terms.

REPRESENTATIVE KEYSER noted that on page 4, it said that the grants would be awarded on the following basis; and the language, "the number of people served" was one of these; and he wondered if this would, in any way, really affect the small counties, who really do have the problems but not the numbers. He asked if they are going to get shorted on the funding. REPRESENTATIVE KEMMIS replied that he would certainly hope not and he would be amenable to anything that would make it clear that that is not the intention. He thought that special priority should be given to regional programs so that it would not be concentrated in the larger cities and would serve outlying areas as well. He indicated that there is language on the top of page 5 that says that grants

should be shared equally on the four entities - state agencies, cities and counties, etc.; and he thought that language stating it should be shared on an equitable basis throughout the state would be no problem.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 845

REPRESENTATIVE KEMMIS stated that this bill was introduced at the request of the Department of Justice; and this establishes a mechanism for seeing that drunk drivers are taken off the road as quickly as may be possible, while providing for all their guarantees of their constitutional rights. This bill deters drunk driving by requiring the Division of Motor Vehicles of the Department of Justice to suspend or revoke, without regard to related criminal charges, the driving privileges of any person arrested for operating a motor vehicle while under the influence of alcohol, when alcohol concentration is 0.10 or greater; granting the arresting officer authority to seize the driver's license; providing notice of suspension or revocation of driving privileges and opportunity for hearing or petition to the district court; providing for a temporary driving permit; prohibiting the granting of a restricted probationary license during the first 90 days of any suspension or revocation; specifying periods of suspension and revocation; providing that suspension or revocation under this act and for criminal conviction arising out of the same occurrence must run concurrently; providing for a reinstatement fee; and providing for an administrative hearing and judicial review.

STEVE JOHNSON, Assistant Attorney General, said that he strongly supported this bill. See EXHIBIT D.

DUANE TOOLEY, Chief of the Driver Services of the Motor Vehicle Division of the Department of Justice, offered testimony in favor of this bill. He stated that if a person is picked up for drunk driving and is at

.10 or greater, his license is removed physically from his possession and he is returned a temporary license and during this time, he can request a hearing.

DORIS FISHER, representing Montanans Against Drunk Driving, stated that they strongly support this bill; that a lot of these people are charged with DUI; and they have a .26 blood alcohol level; they are given their licenses back; and they drive for several months very unsafely before they ever come to trial. She contended that they equate this to an armed burglar who would be taken to the station; he would be charged; he would be told when to appear in court; and then the nice polite police officer would hand him his loaded revolver, because, after all, it is his property. She felt that this seemed a little ridiculous; but this is, frankly, what is being done with the drunk driver.

MICHAEL WOOD, manager of the Missoula County Drunk Driver Prevention Program, offered testimony in support of this bill. See EXHIBIT E. He also offered prepared testimony from Jim Nugent, City Attorney for the city of Missoula, and Betty Wing, Deputy County Attorney for Missoula County. See EXHIBIT F and G.

There were no further proponents.

BILL ROMINE, representing himself, said that he was standing in the hall and heard some of the testimony; and he is not appearing on behalf of drunk drivers. He testified that the proponents believe that the only reason people are not convicted of DUI is because they have a really hot-shot lawyer or the court system is really fouled up; and he indicated that this was not true. He stated that sometimes people are not convicted of DUI because they are not guilty. He told the committee that he had a client who had been picked up for DUI, the test came back .40, which means that she was just about one degree above comatose; this was a young girl in her early twentys; her mother said that the girl was not drunk; they got a look at the video tape; and he contended that if this girl was .40, everyone

in this room today is .40. He stated that the arresting officer had been discharged from two previous positions; and they finally came to the conclusion that a mistake had been made and this lady was not guilty. He asserted that if they pull the license, they will not stop the drunk drivers and the true drunk drivers will go right on driving drunk. He emphasized that most of the people sitting in this room could have probably been picked up at one time when their blood alcohol level was at .10; that person is going to have his license pulled automatically for six months; and if it is turned out that he is not guilty, he will have the loss of his driver's license for six months without committing a crime. He informed the committee that he does not sympathize with drunk drivers; he does not want his kids killed by them; but he is not sure that they want to penalize everyone.

There were no further opponents.

REPRESENTATIVE KEMMIS said that he appreciated Mr. Romine's testimony; and he hoped that the bill was so drafted that where mistakes are made, there is a clear opportunity for the driver to demonstrate a mistake has been made, and to do that without suffering any interruption of his driving privileges. He indicated that the bill provides for the issuance of temporary licenses; it provides for judicial review of the question of the sufficiency of the test; it allows the district court to continue to grant temporary licenses during the period of judicial review; and he felt that it was fairly carefully constructed to take care of these problems.

REPRESENTATIVE KEYSER asked about a time frame, and indicated that, if a person was charged with DUI and did not take the test so it was not known if he was .10 or not; the officer fills out the necessary forms and sends them in; there is an automatic suspension of his driver's license and he wondered if he would lose his license until all this process was through and he wanted to know basically how many days would this process take. MR. TOOLEY responded that the implied consent might take place within three or four days; sometimes they get the license back so it is

certainly possible that an individual might have his license in his possession for up to thirty days before it can be taken away. He indicated that, if he is convicted, he goes through a court process; he has to wait for the paper work; and this generally takes about twelve days.

REPRESENTATIVE KEYSER noted that according to this bill, if the man does submit to the test and has a .10 reading, he can immediately have that license pulled and a notice will be given to him at the time he is being charged. He felt that, if the individual went the other route, he undoubtedly would have his license for a longer time. He declared that it would not take long for people to figure this out and then refuse the test rather than taking the test. MR. TOOLEY replied that he thought that was a fair statement, but there are two other bills addressing this problem.

REPRESENTATIVE RAMIREZ asked which two bills address that particular problem. CHAIRMAN BROWN responded Senator Halligan's bill and Representative Kitselman's bill.

REPRESENTATIVE RAMIREZ said that Mr. Johnson indicated that the U. S. Supreme Court has upheld this kind of statutory provision; as he understood the written testimony, that case upheld suspension for refusal to submit to an alcohol test. MR. JOHNSON said that this was right and on page 3 of the written testimony, there was a slightly erroneous statement there and that it was a law providing for an immediate suspension for failure to submit to the test.

REPRESENTATIVE RAMIREZ asked if he thought that it might be at least conceivable that the supreme court might draw a distinction between an immediate suspension for an act, which occurs right in the presence of a police officer (the refusal to take the test) as opposed to basing it upon test results, which may or may not be accurate. MR. JOHNSON replied that he, personally, did not think so.

REPRESENTATIVE DAILY indicated that, under this bill, they are presumming that if a guy takes a blood alcohol test,

and it is more than .10, that he is drunk; and he asked if this was not similar to Representative Eudaily's bill on the rebuttable presumption on the school bus thing. REPRESENTATIVE KEMMIS replied that what they are talking about there was a criminal penalty; and there would be some relationship there. He said that this was not meant to be a criminal penalty; this is an administrative procedure to protect the safety of the public by getting these individuals off the road. He continued that the criminal proceeding is entirely separate and this is not a criminal proceeding.

CHAIRMAN BROWN asked if the severity of the impact was not worse than the criminal sanction. REPRESENTATIVE KEMMIS replied that there is no doubt but what this is a severe impact. He emphasized that sooner or later they are going to have to get to the question of whether they can continue to allow people who insist on driving drunk to do so; they are talking about the reevaluation of the weight to be given to the privilege of driving as opposed to the weight to be given to the seriousness of driving while drunk. He continued that there is no doubt but what this bill says is that the privilege of driving is conditional upon doing so in a sober condition.

REPRESENTATIVE DAILY said that he felt they were trying to get the drunk driver off the road, and he supports that; but he thought that this is talking about the habitual drunk driver; and what they are talking about in this bill, is the first-time possible drunk driver. REPRESENTATIVE KEMMIS replied that that is true; this could happen to someone who is just caught once, but the overall attitude they are trying to instill is that what they should do, as a state, is to make it clear that there are two things that are mutually exclusive; and one is drinking and the other is driving. He emphasized that if they are going to do both, they are going to be taking some very substantial risks.

REPRESENTATIVE DAILY asked if he thought the bill will have any effect on the habitual drunk driver. REPRESENTATIVE KEMMIS replied that he thought it might prevent, along with the educational bill that they heard earlier, many from becoming drunk drivers; he felt that it was an overstatement to say that everybody simply ignores the suspension of a license; there are those who do, but they are in the minority; and, yes, he did think that it would cut down on habitual drunk drivers.

REPRESENTATIVE FARRIS questioned Mr. Wood about the grant that he mentioned. MR. WOOD responded that this would be earmarked for the prevention of drunk driving; and he requested Mr. Goke to respond to this. ALBERT GOKE, Administrator for the Highway Traffic Safety Division of the Department of Justice, responded that congress in October of 1982, passed a law which was intended to be an incentive law; and in this law, there was some basic criteria and one thing it required is that the person who is recorded at .10 be taken off the road within a designated period of time. He commented that what the federal law is doing is telling the states, in addition to some other factors, if they would like to receive some of the moneys, they will have to do some of these things that are required.

REPRESENTATIVE FARRIS asked what can they do with the money once they have it - can they use it to fund Galen, support a junior high school program in education - what is the money for. MR. GOKE replied that basically it would have to be committed to the drinking and driving area, but, as far as Congress going overboard and setting criteria, this is pretty wide open.

REPRESENTATIVE RAMIREZ asked if the committee could get a copy of that criteria.

REPRESENTATIVE FARRIS noted that people do not get into their license and drive down the highways - they get into their cars and drive down the highways; and she wondered why they do not impound their vehicles. REPRESENTATIVE KEMMIS responded that, in most families, while there may

be one drunk driver and one car, there may be a sober driver also.

CHAIRMAN BROWN asked about the study that was cited. MR. GOKE responded that this study was in August of 1981, and they wanted to determine how people reacted to drunk drivers. He explained they ran the survey in the Capitol Hill Shopping Center; they asked a number of questions and only one in fifty knew that state law said that .10 was the presumptive limit of intoxication.

CHAIRMAN BROWN asked if this was prior to the campaigns presented by M.A.D.D. MR. GOKE stated that not much has really been done to educate; and the real issue is education. He contended that there is certainly a lot of awareness, but there is not much being done to really educate.

REPRESENTATIVE BERGENE questioned what the current law is for apprehending someone who has already had their license suspended and is now driving drunk. MR. JOHNSON responded that there is a law that allows for a jail sentence and an additional suspension again for six months and other penalties, but he was not sure and could find out for her.

CHAIRMAN BROWN declared that most of these DUI bills appall him a little, in light of the last session action opposing man-mandatory sentencing bills, which he also opposed. He indicated that his concern is with the first-time offender and the inability of the statute to discriminate between a person who once in his lifetime goes out and does something wrong and the habitual offender. He asked if he felt that, especially since the suspension is 90 days for a first offense, that this is a just and reasonable system of justice. REPRESENTATIVE KEMMIS responded that it is not meant to be an enforcement of justice, but it is meant to protect the public; and he thought it was important to bear that distinction in mind. He commented that he himself has probably been on the road when he should not have been, and he would suspect that this may be true of almost all of us;

but when we see bills like this, we say that it is not me that they want to get here - it is the habitual offender. He contended that he did not think that that is what this state is aiming at or what the citizens are saying; they are saying they want a different attitude toward drinking and driving; they do not need a different attitude on the part of habitual offenders; they need a different attitude on the part of all of us; they need an attitude that says they are not going to drink and drive anymore. He emphasized that it is only in this context that this makes sense; if that is not what is meant; then they should not pass this legislation.

CHAIRMAN BROWN asked if this was an attempt to legislate morality. REPRESENTATIVE KEMMIS responded that it was not. He reiterated that it is not a question of whether you drink - you can drink all you want - it is not a question of whether you drive - it is a question of whether you do them both together.

MR. JOHNSON explained that the penalties for driving, while the license is suspended or revoked, is imprisonment for not less than two days or more than six months; and a fine up to $500.00 and, in addition, the division may suspend an additional like period - if you are operating under a six-month suspension, they may suspend for an additional six months.

CHAIRMAN BROWN advised that they had been expecting a lot of other bills that have not shown up concerning DUI; and he noted that all these bills have a different definition of where you can be arrested. He wondered if the committee should try to maintain one definition in all these bills. REPRESENTATIVE KEMMIS responded that he felt that they should and he thought the definition in this bill is the best, as it gets at the problem of the parking lot and the shopping center without getting into an individual's own driveway.

REPRESENTATIVE RAMIREZ asked if there was a fiscal note. REPRESENTATIVE KEMMIS responded that there was a fiscal note requested but it has not arrived. He indicated that

they had rough calculations, and the net cost that the budget office is projecting would be in the neighborhood of $200,000.00. He thought this was in the biennium. MR. TOOLEY responded that that is a reasonably correct figure, but that the committee should be aware that the bill has a self-funding provision so that this would be a one-time expense for getting started.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 768

REPRESENTATIVE WALLIN, District 76, said that this was a short and straight-forward bill, which gives surveyors the right of access onto private property whenever necessary for the completion of a survey. He stated that many large landowners can effectively halt the survey of adjacent property.

MICHAEL FOLEY, representing the Montana Association of Registered Land Surveyors, said that the reason for this bill is primarily because of the increasing incidence of landowners refusing access to their property; that access is essential under state and federal regulations for completing a survey; and he presented a chart to the committee, which showed the procedure they use in completing these surveys.

BOB CUSTER, President of the Montana Association of Land Surveyors, testifed that they sent out a questionnaire to 265 land surveyors, receiving a 35 per cent response. See EXHIBIT G-2.

DAVID BOWMAN, a land surveyor in private practice from Ennis, cited a case wherein he was hired to do a survey and a recent buyer of a corporation had already taken possession of a ranch; he refused access; and it took two months to negotiate to get access to this land in order to complete the survey.

RON BURGESS, a surveyor from Bozeman, stated that once or twice a year he has problems gaining access and gave an example of one survey he was trying to do, wherein the owners of both properties had been on the property all their lifes; for two generations there had been a dispute over a meandering fence; one property owner decided to do a survey and decide this problem; but the other owner would not allow him on his property to do a survey. He testified that this ultimately ended up in court and actually going to the supreme court.

There were no further proponents.

BILL GILLIGAN, a rancher from Rosebud County, testified that there was considerable amount of surveying done in his area; one of the problems he has with this bill is that he sees nothing in there about notifying the landowner; and he felt that this would be just asking for trouble. He contended that they have a lot of people trespassing, some for very dubious reasons, and he felt that something should be in the bill about notifying the landowner before the survey. He continued that they are putting the burden of proof on the landowners - if he catches trespassers on his property (no matter what the intent) then he is the one who has to go to court to defend his right to run anyone off; and this creates a tremendous amount of trouble.

HERB MOBLEY, a landowner from Rosebud County, cited an example wherein his family was just getting up around daylight when they heard a vehicle; he found a surveyor in his field with a tripod; he said he was doing a survey for Mr. Jones, who lived a mile and a half from where this fellow was; he ran him off; and he will continue to do so. He felt that this bill was an invasion of privacy on the landowners.

There were no further opponents.

REPRESENTATIVE WALLIN stated that in section 5, there are safeguards against trespassing, which should satisfy the fears of the landowners; and he could not see any reason why they could not add a line that says prior to entering those private lands, notice will be given.

MR. CUSTER noted that part of the problem with a letter of notification is that they have a very difficult time tracing who the actual landowner is so that they can get notification to him. He said that there are transactions that do not get recorded at the courthouse for years. He stated that they have no objection to notifying, or attempting to notify, the landowner; and the majority of the time they always get access by contacting the landowner; but when the landowner says they cannot have access, that is when they have a problem.

CHAIRMAN BROWN indicated that there are cases where a state or federal highway may be running across a landowner's property; the Highway Department cannot make its case until they get some values settled and the landowner is fighting the highway and, in most cases, this would also constitute keeping the surveyors out as long as possible. He asked if it was not true that this would interfere in that process. REPRESENTATIVE WALLIN felt that this would help in the settlement so that they would not have to worry that they were doing something wrong by making a survey and, in doing the survey, it would stop the fight. CHAIRMAN BROWN responded that it would stop the fight, but he was not sure the right side would be stopped.

REPRESENTATIVE JENSEN noted that the bill says on page 1, line 17, that the surveyor is not liable for exemplary damages except when the damages are a result of gross negligence. He asked if he felt that this was a narrow requirement. REPRESENTATIVE WALLIN replied that they have to realize that he is not doing this for himself, he is doing it for someone else, who is going to benefit from that survey. He stated that these are professional people who are working for a fee.

REPRESENTATIVE JENSEN noted that he said that a beneficiary of this would be the client and not the surveyor, but he asked if the surveyor, in fact, get remuneration for his services. MR. MOBLEY responded yes. REPRESENTATIVE JENSEN questioned if he had a hot engine and got a grass fire going, would he say that that was a gross negligence. MR.

MOBLEY responded that he would not consider that gross negligence.

REPRESENTATIVE EUDAILY asked how they can put in the bill language so that they can assure the landowner he is going to be approached prior to the time they come on this property to do the work. He noted that they said it was difficult to find out but he thought they could go to the records and find out much easier than a big game hunter can find out whose property it is that he wants to go hunting on. He indicated that he saw a need in this bill to guarantee something to the landowners that they should be willing to do as a first step and maybe a second step. MR. CUSTER replied that he would have no objection to this and in the California statute, they have language which states that a proper attempt to make contact with the landowner will be made, but it does not absolutely force you to see the landowner face to face, because lots of time that is very difficult.

REPRESENTATIVE ADDY asked if they can identify a certain class or people with common characteristics that normally oppose access. MR. CUSTER replied that this problem did not exist to a great extent ten years ago, but it is an increasing problem, moreso with new residents coming in. He indicated that generally Montanans will agree to access, but the new resident coming in is an isolationist and he will absolutely do anything in his power to stop development of his neighbor's property; and he felt that this was a growing problem.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 769

REPRESENTATIVE WALLIN, District 76, Bozeman, explained this bill, which is an act creating a lien against a motor vehicle for the value of the parts furnished for the motor vehicle and for any work or any labor performed on the motor vehicle. He said that, at the present time there is a very ineffective method for collecting for services that have been performed on a car and not paid for; and this bill is designed to treat this problem just as the man who sells a new furnace, a rug or a new roof and is not paid for it.

BILL ROMINE, representing the Montana Automobile Dismantling and Recycling Association, said that wrecking yards are often involved in the repair of automobiles, and that somebody who has enhanced the value of a piece of property is entitled to a lien upon that piece of property. He testified that this would give the person who works on a car an alternative to holding that piece of property.

JERRY RAUNIG, representing the Montana Automobile Dealers' Association, supported this bill and he thought this bill would go a long way to solving some of these problems by creating a centralized location for the filing of liens.

There were no further proponents.

LARRY MAJERUS, representing the Motor Vehicle Division of the Department of Justice, said they had no position on this bill; but about 60 per cent of the vehicles that have titles on them now have liens. He pointed out that on page 4, a lien filed under this section does not have to be accompanied by a certificate of ownership or a title and that presently all others, except for those on new cars, when a lien is filed, it must be accompanied by a certificate of ownership. He said this was done with the intent that the certificate would show the liens on it and anyone who wanted to buy that car would receive some kind of notice. He just wanted to note this as it was an exception to the present procedure.

REPRESENTATIVE WALLIN cited an incident, wherein they repaired a man's car, he went to Denver on a trip, some of his parts were back ordered and they trusted him and that was the last they ever saw of him. He said there was no way they could collect that bill for $800.00.

REPRESENTATIVE ADDY asked how the subsequent purchaser of a vehicle that has a lien on it know that there was a lien on it. REPRESENTATIVE WALLIN replied that he knows because there would be a stop on that title.

REPRESENTATIVE ADDY said that he understood that you can be under the impression that the title has been transferred simply because the back of the title has been endorsed; and unless the lien shows up on the title itself, it is very possible that a person could pay for the car once and then have to pay for it again because of the garage lien. REPRESENTATIVE WALLIN said that when he goes to transfer the title over at Deer Lodge, there will be a stop order on it showing that there is a lien on it; and he can come back to whoever he bought the car from and say there is a lien on there. He has gotten a notice as the bill says a notice is sent to the registered owner or the legal owner.

REPRESENTATIVE ADDY says his point is that he sends the title to Deer Lodge after he has already paid the money for the car. MR. ROMINE replied that when a lien is sent in, it is not accompanied by a title; as he understands it, Deer Lodge issues a new title and they send this back to the owner - this would be the same as if they had a lost title - the owner now has two titles - one that says there is a lien and one without - the owner who is not very honest could use the original and he said that he sees this as a problem but not a major problem.

REPRESENTATIVE ADDY asked if they would mind if they put language in the bill that said that a subsequent purchaser has priority over the lienholder. MR. ROMINE replied that there would be no problem.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 761

REPRESENTATIVE ADDY, District 62, Billings, said that this was a bipartisan bill, which would add two judges to the office of the workers' compensation judge and provides for a chief judge. He testified that right now they have one

workers' compensation judge and the workload has simply piled up. He stated that a legitimate claimant who has a dispute with the insurer has to wait several months for a resolution of the dispute and, therefore, any payment of a fully justified claim.

JIM MURRY, Executive Secretary of the Montana State AFL-CIO, made a statement in support of this bill. See EXHIBIT I.

JOHN YODER, representing the Yellowstone Valley Claimants' Attorneys' Association and himself, offered testimony in support of this bill. See EXHIBIT J.

KARLA GRAY, representing the Montana Trail Lawyers' Association, gave testimony in support of this bill. See EXHIBIT K.

There were no further proponents and no opponents.

REPRESENTATIVE ADDY closed.

REPRESENTATIVE SPAETH asked how much is this going to cost. REPRESENTATIVE ADDY replied that he had not seen a fiscal note, but there was a possibility that not all the cost for the judges would come from the general fund. The comment was made that none of the costs come from the general fund and the costs come from an assessment.

REPRESENATIVE SPAETH queried why they picked two judges as opposed to one. REPRESENTATIVE ADDY replied that he thought there was enough workload there for three judges, at least this was how it was described to him.

JUDGE TIMOTHY REARDON, Judge of Workers' Compensation Court, indicated that the average length of time between the date when the case is submitted and the date of the decision is about four to five months; the longest period of time has been about eight months and the shortest was a day or two. He stated that he has 77 cases that he has heard that are undecided; he will begin traveling in March throughout the state and they will hit eight cities in the state and they have 125 cases set for trial.

REPRESENTATIVE SPAETH said that he wondered if they have three judges, and once the backload is taken care of, then they would not have that much of a problem. JUDGE REARDON responded that there is no way that he could tell them that they will have 500 cases this fiscal year or 200 next year; but he felt that people are put into situations where they might have to settle these simply because of financial pressure; he thought it was an advantage to turn cases over faster and, as far as two judges vs. one, he did not really know, except that three judges could turn things over faster than two and certainly faster than one.

REPRESENTATIVE ADDY said that in Mr. Murry's testimony, he indicated that there were procedural burdens that have been placed on these judges and he said that he was willing to defer to the judgment of the committee as to whether one additional judge or two additional judges would be more appropriate.

REPRESENTATIVE SPAETH said that the appropriations committee acted favorably to a hearing examiner to help take over some of the caseload and he asked if this would not help and they should only need two judges. JUDGE REARDON replied that with a hearing examiner, this is going to speed things up and he felt it was a matter of how fast they wanted it done and how much they are willing to pay.

REPRESENTATIVE SPAETH asked how come they are having skyrocketing numbers of cases; there are already more cases filed this year than there was in the whole year of 1981. JUDGE REARDON replied that he could not answer that; that there are a lot of possible reasons; he doubted if it was completely based on the state of the economy; Mr. Blewett has some statistics showing that two or three years ago, there was an increased number of accidents and maybe, those claims are maturing at this point. He said he heard there were more lawyers practicing in the state and that could cause some of the problem.

MR. MURRY explained that there are 40,000 workers in the state that are now without jobs, which means that in many instances, they will have workmen's compesation claims filed that they might not otherwise take care of - if they have the opportunity to work, they will put off filing those claims sometimes. He indicated another problem they are running into is that they do not have the inspectors from the field making the inspections relating to safe working conditions as they have cut back on the safety protection for workers under the Occupational Safety and Health Act. He commented that the result of that is that the accident rate is going up.

REPRESENTATIVE JENSEN asked who sets the salary for the judges and what is that salary. JUDGE REARDON responded that a workmen's compensation judge is paid the same as a district court judge and he is not on the judges' retirement system - he is under P.E.R.S. REPRESENTATIVE ADDY noted that this is around $42,000.00.

REPRESENTATIVE ADDY said that if they have two judges and each of them is based in a different part of the state, this would cut down on the windshield time that they have to spend in relation to their job. JUDGE REARDON responded that he now travels nine cities throughout the state; he will start traveling the middle of March and will finish about the middle of June; they will spend some time in Helena, but it is a problem getting more than two or three days to sit down and read all this with just one judge.

REPRESENTATIVE JENSEN asked what costs come from the general fund. JUDGE REARDON replied that no costs come from the general fund; it is all taken out of assessements collected by the Divisision of Workers' Compensation by assessing the insurers of the state.

REPRESENTATIVE JENSEN asked how do they access this. MR. BLEWITT responded that it is directed to the insurance companies who are insuring the employers.

REPRESENTATIVE EUDAILY asked if they are going to have three of these judges; if people aren't satisfied, their next goal is to take it to the supreme court and he wondered if they are just loading up the supreme court. JUDGE REARDON replied that there is that possibility, but he felt that the number of appeals would be fewer, but anytime you have more than one judge, you are going to have that problem. REPRESENTATIVE ADDY responded that those same cases will get into the supreme court more quickly; but he thought that the more rapidly the process of dispute, the less likelihood that the dispute will become confused during the process itself. He thought that this might actually cut down on the number of appeals.

REPRESENTATIVE SPAETH asked when they recommended a hearing examiner, why they did not recommend a judge at the same time. JUDGE REARDON responded that their budget was submitted last August and September; he reacted to what he perceived to be a problem; he felt that a hearing examiner was less costly and would have a better opportunity to succeed. He presented alternatives and one was contracted services and another having law clerks doing the actual physical writing.

REPRESENTATIVE SPAETH asked if once they get through the problems of the economy, there are some policy changes back in Washington, they do not have the lay-offs, he wondered if they are going to need these judges. MR. MURRY said that he did not think he could really respond to that and he felt that if they get to the point where the judges are not needed, then the legislature could address that at that time.

There were no further questions and the hearing on this bill was closed.

The committee recessed at 10:24 a.m. and reconvened at 10:35 a.m.

HOUSE BILL 808

This bill allows an arresting officer to immediately suspend the driver's license of a person refusing to submit to a chemical test; increasing the period of suspension; requiring the issuance of a temporary occupational license in certain instances and allowing the appeal of the suspension to be filed in the district court of the county in which the arrest was made.

REPRESENTATIVE KITSELMAN, District 60, Billings, stated that he thought there were some basic questions that needed to be addressed, i.e. how does one prevent innocent people from being killed; how can one prevent traffic accidents; how can one protect and make our peace officers' job easier; and how does one protect the rights of the individual through due process. He indicated that this bill accomplishes and addresses all of these questions; it protects the needs of people; it allows for the immediate suspension of one's driving privileges and allows for due process after the suspension.

LARRY MAJERUS, Administrator of the Motor Vehicle Division of the Department of Justice, explained that the immediate suspension would now take care of the problem they now have with pickup orders as in 60 per cent of the cases, they do not send in their driver's license when they are requested to. He testified that in implied consent, the refusal to submit to a test and the punishment carried with that is a very important element in dealing with the overall drunk driving picture. He said that an increasing number of people are refusing and the number of refusals have doubed over the past few years.

DORIS FISHER, representing Mothers Against Drunk Driving, said that they have to get rid of the permissiveness that is allowed in letting people refuse to take the test and that there should be immediate seizure of the license, which is swift and sure. She stated that the issue of driving and drinking has not been confronted and this is how it has to be done and as long as this behavior is allowed, it will continue.

ALBERT GOKE, Administrator of the Highway Traffic Safety Division of the Department of Justice, indicated that one portion of this bill would make them ineligible for funds, i. e. federal guidelines read that no provisional license shall be made available if one refuses the implied consent law. He indicated that his personal belief is that allowing any type of hardship license is likely to be a bad step irregardless of federal money. He felt that all of those refusing would apply for hardship licenses and the way he reads it, everyone would be eligible.

MICHAEL WOOD, Manager of the Missoula County Drunk Driver Prevention Program, gave a statement in support of this bill. See EXHIBIT L. He also presented written testimony from JIM NUGENT, City Attorney for the City of Missoula. See EXHIBIT M.

There were no further proponents and no opponents.

REPRESENTATIVE KITSELMAN closed.

REPRESENTATIVE RAMIREZ noted that on page 4, it says, "seizure of the license is not required, but the same notice and receipt and temporary permit must be issued" and he wondered if there is some reason why they are not providing for taking this license away. DUANE TOOLEY, Chief of the Driver Services of the Motor Vehicle Division of the Department of Justice, responded that what they are doing in regard to people from other states is extending their driving privileges in Montana; but it will show on the computer that their license is suspended and they will notify that state; so it does have a deterrent effect.

There were no further questions and the hearing on this bill was closed.

HOUSE BILL 787

This bill creates a jail standards commission, defining the powers and duties of the commission and requiring standards adopted by the commission to apply to all county and municipal jails.

REPRESENTATIVE BERGENE, District 36, Great Falls, stated that she was asked by the people who are most interested in this that this bill be tabled. She explained that when they looked at the technical aspects, they decided that this was too short a time to get everything together and change the bill so that it would be acceptable to everyone.

REPRESENTATIVE KEYSER moved that they TABLE this bill. The motion was seconded by REPRESENTATIVE EUDAILY. The motion carried unanimously.

HOUSE JOINT RESOLUTION 23

REPRESENTATIVE BERGENE, District 36, Great Falls, stated that this was a resolution that urged the development of community-based corrections. She introduced PAT WARNEKE, from the Montana State Prison, who testified that there are waiting lists that are months long for those who are eligible for halfway houses; if they were to receive another halfway house today, they could fill it; they could keep it filled; and they could keep a high caliber of inmates in it. He thought by the time they were able to get such a place going, they would probably need another.

DAN RUSSELL, Administrator of the Corrections Division of the Department of Institutions, said that they have three prerelease centers in operation - one in Missoula, which is operated by the state; one in Billings, which is operated by the Alpha House; and another one, which is operated by the state. He stated that they have applied to get programs operational in other areas throughout the state; they have had particular problems both in Great Falls and Helena; and they are zoning those programs as commercial-institutional types of programs. He declared that in order for them to get the program operational, it has to be zoned residential and they are not willing to do that in those two areas. He indicated that this bill was an attempt to encourage these people in the zoning process to give consideration to these programs as being in a residential zone.

There were no further proponents and no opponents.

REPRESENTATIVE BERGENE commented that the possibility of a prerelease center in Great Falls is still very much alive and she felt that this resolution was a reaffirmation to their committment to this prerelease program concept. She felt that the prerelease program should always be part of Montana's correctional system.

REPRESENTATIVE KEYSER asked if they have always used the definition "community-based corrections" and "prerelease centers" as one and the same. MR. RUSSEL responded that they have only gotten into prerelease programs in the past two years when the Alpha House program was established. He indicated that prior to that time, the Missoula Life Skills Center was designated as a community-based program, so within the community-based concept there are different types of programs, one of which is prerelease.

There were no further questions and the hearing on this bill was closed.

EXECUTIVE SESSION

HOUSE JOINT RESOLUTION 23

REPRESENTATIVE ADDY moved that this bill DO PASS. REPRESENTATIVE JENSEN seconded the motion

REPRESENTATIVE CURTISS moved to amend the bill on page 2, line 23, by striking the remainder of that material on page 2, following "corrections". REPRESENTATIVE EUDAILY seconded the motion.

REPRESENTATIVE CURTISS explained that she felt that they would be remiss in letting this go out that way, because this has really been the root of the problem in the communities.

REPRESENTATIVE BERGENE replied that she would really have to resist that amendment; at a subcommittee meeting on institutions, they were concerned that they had not continued with the bill from the task force that said in very firm language that prerelease centers were not to be zoned as institutions anywhere; and they were to be considered as residential facilities. She informed the committee that the reason that that bill did not go out was because there was a threat that if they did something like that, people would then consider how they should handle community group homes, i. e. should they also be considered institutional because they come out of the Department of Institutions. She continued on the other hand,

they would really be remiss if they did not say anything to the communities, because to consider these prerelease centers as public institutions usually puts them on public land outside the city. She felt it was very important for these people to be in the hub of the city and have access to whatever they are going to do for their rehabilitation. She emphasized that to urge the communities to do that would be taking some leadership on the part of the legislature.

REPRESENTATIVE FARRIS inferred that this amendment is counter to the purpose of the resolution and there was no point in having the resolution if they accept the amendment. She asked how can they have community-based corrections that are not in the community and how do you have a prerelease center that helps people adjust to the pressures of urban life if they are not in urban settings.

REPRESENTATIVE ADDY commented that he had a couple of D.D. group homes in his district and one prerelease center in his district and he did not know what any of them were until he knocked on the door and someone came and explained to him about the residents.

REPRESENTATIVE EUDAILY said the word that bothers him is "zoned"; he felt the statutes specifically give the local communities the right to do their zoning and he wondered if it could be stated that they be treated as residential facilities, he felt he could accept that; but when you are telling them that you want zoning done our way, he thought this was a mistake.

REPRESENTATIVE KEYSER said that was exactly what he was going to say - he did not feel that they had any right to tell a city how to zone or what to do with their zoning.

REPRESENTATIVE JENSEN informed the committee that he use to live in Missoula and there were three places that had their walks cleaned after any snow storm in his

neighborhood and he later found that all three of those were some kind of special institutional homes. He commented that there was absolutely no other distinction and they were the best of neighbors - better than most neighbors and they set a good example for the rest of us; and he thought that the language could read "any prerelease center be treated as a residential facility".

CHAIRMAN BROWN suggested that they use the word "accepted".

REPRESENTATIVE BERGENE said that she could accept that too; that zoning is a fact of life; they lost a prerelease center in Great Falls and it still came down to zoning.

REPRESENTATIVE CURTISS withdrew her amendment.

REPRESENTATIVE JENSEN moved to amend the bill on page 2, line 24, by striking "zoned as if it were" and insert "accepted as". REPRESENTATIVE IVERSON seconded the motion.

REPRESENTATIVE FARRIS made a tentative substitute motion that they amend the bill on page 2, line 23, following "and" insert "it is suggested". She said that this is a resolution and not a law and she would really like the legislature to suggest that the cities look at their zoning. She contended that zoning is the issue here and if you take out the word "zoned" they have lost sight of the whole issue. REPRESENTATIVE SCHYE seconded the motion.

REPRESENTATIVE RAMIREZ said that he would like to speak against it because he still felt the focus was wrong, i. e. we are telling them what to do instead of asking them to do something on their own. He suggested wording such as, "give consideration to zoning classifications" and he felt that they did not have to say what they might be, and then add "which would permit greater latitude in finding locations for prerelease centers". He contended that then they would be saying would you at least consider

trying to do something about this zoning and not telling them what we think they ought to do.

A vote was taken on REPRESENTATIVE FARRIS's amendment and there were 8 voting yes and 10 voting no. See ROLL CALL VOTE.

RERPRESENTATIVE RAMIREZ made a substitute motion to amend on page 2, line 23, following "and" by striking the remainder of the paragraph and inserting "and give consideration to zoned classifications which will permit greater latitude in finding suitable locations for prerelease centers." REPRESENTATIVE SPAETH seconded the motion.

REPRESENTATIVE BERGENE said that she was concerned about the word "suitable" because she did not want it out of the heart of the city and for most people "suitable" means away from somewhere.

REPRESENTATIVE JENSEN indicated that he opposed the amendment as he felt the language he proposed was more with the intent of this bill.

The motion failed with 8 voting yes and 10 voting no. See ROLL CALL VOTE.

REPRESENTATIVE RAMIREZ spoke against the amendment offered by REPRESENTATIVE JENSEN, as he felt this was a horrible statement and it does not have any impact. He felt that if he were in local government, he would not accept it; he hoped that they would do it, but they should not be so naive to accept that as another residential facility.

REPRESENTATIVE FARRIS commented that the one in Billings has a grade school across the street from it; an order of nuns have adopted it; and she did hope that the residents will eventually accept this and normally people resist change, but accept it once it has been there.

REPRESENTATIVE RAMIREZ said that the facility in Billings is not in a residential area; it is in an old hotel which

has been remodeled; it is very nice, but the school is about a block and a half away and is a parochial school, which is close to the cathedral and close to the convent, but it is in a business center and a downtown area and it is really not a residential area.

REPRESENTATIVE FARRIS informed the committee that the site that was selected in Great Falls was across the street from an empty parking lot, next door to a second-hand store and not adjacent to any property that would be considered residential and was about three blocks from the downtown bus terminal. She contended that she could not consider this residential, but the residents there did.

The motion offered by Representative Jensen was adopted with 11 voting aye and 7 voting no. See ROLL CALL VOTE.

REPRESENTATIVE ADDY moved that this resolution DO PASS AS AMENDED. REPRESENTATIVE JENSEN seconded the motion.

REPRESENTATIVE RAMIREZ stated that he did not like the language on lines 12 through 18.

CHAIRMAN BROWN replied that they will hold this bill for another day. They still have seven bills to act on and will meet at 7:00 a.m. tomorrow.

REPRESENTATIVE KEYSER moved that the hearing be adjourned. The time was 11:28 a.m.

Dave Brown
DAVE BROWN, Chairman

Alice Omang
Alice Omang, Secretary

ROLL CALL VOTE ------ HOUSE JUDICIARY COMMITTEE

	Date: 2/18 No: HJR 23 Farris Amendment	Date: 2/18 No HJR 23 Ramirez Amendment	Date: 2/18 No: HJR 23 Jensen Amendment	Date: No:	Date No:	Date No:	Date: No:
BROWN, Dave	no	yes	yes				
ADDY, Kelly	yes	no	yes				
BERGENE, Toni	yes	no	yes				
BROWN, Jan	no	no	no				
CURTISS, Aubyn	no	yes	no				
DAILY, Fritz	___	___	___				
DARKO, Paula	yes	no	yes				
EUDAILY, Ralph	no	yes	no				
FARRIS, Carol	yes	no	no				
HANNAH, Tom	no	yes	no				
IVERSON, Dennis	no	yes	yes				
JENSEN, James	yes	no	yes				
KENNERLY, Roland	yes	no	no				
KEYSER, Kerry	no	yes	yes				
RAMIREZ, Jack	no	yes	no				
SCHYE, Ted	yes	no	yes				
SEIFERT, Carl	no	yes	yes				
SPAETH, Gary	no	no	yes				
VELEBER, Dennis	yes	no	yes				
	10-no 8-yes	10-no 8-yes	11-yes 7-no				

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE BILL 796 Date February 18, 1983

SPONSOR REPRESNETATIVE KEMMIS

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Michael Wood	Missoula Co	Missoula City-Co Health	—	
C.T. CANTERBURY	HELENA		✓	
Candis Compton	Helena	Alcohol & Drug Abuse	X	
Walt Hahn	Helena	Highway Safety	X	
Jo Mahoney		DMV	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit A
HB 796
2/18/83

PROPOSED AMENDMENTS TO HB 796

1) Title, line 11.
Strike: "53-24-103, 53-24-108, 53-24-206,"

2) Page 5, line 8.
Following: "programs"
Strike: line 8 and through "program" on line 10

3) Page 7, line 16.
Strike: "A"
Insert: "(a) Subject to the limitations in subsection (b), a"

4) Page 7, line 23.
Following: "]"
Insert: " (b) In no case may the combined fine and surcharge imposed by a city or justice court exceed $500."

5) Page 9, line 23 through page 16, line 22.
Strike: sections 11 through 14 in their entirety.

EXHIBIT B
HB 796
2/18/83

MISSOULA CITY-COUNTY
HEALTH DEPARTMENT
301 West Alder · Missoula, Montana 59802 · Ph. (406) 721-5700

February 18, 1983

TESTIMONY ON HOUSE BILL 796

I am Michael Wood, M.S., M.P.H., Director of Health Education for the Missoula City-County Health Department. I have been involved in alcohol abuse prevention programs in Missoula over the past five years.

To lighten your day and break the monotony of endless and sometimes tedious testimony, I would like to open my testimony with a short fairy tale. I beg your indulgence, for the story makes an apt and highly relevant point.

Once upon a time there were two towns located on a rather large, swift river. One town, called Downstream had to deal with a difficult problem. Daily, two or three dozen people floated by, drowning in the river. Some time ago, the citizens of Downstream, being socially concerned and responsible people decided that something needed to be done about this problem. So, they trained lifeguards, bought rowboats and a helicopter, built a hospital, recruited doctors and opened a special wing on the hospital dedicated to the inpatient and outpatient care of drowning victims. With all of this high technology and personnel, they were able to save a few each day. But somehow, many just kept being swept down the river and drowned.

A Downstream fisherman on the banks of the river observed this all with bewilderment and then curiosity. "What's going on in Upstream?" he asked himself. The fisherman walked a few miles upriver to the town of Upstream. There he beheld an astonishing sight! People were swimming in a small river inlet and were being swept away; there was a man on a bridge over the river who was ambushing pedestrians and throwing them into the river; there were canoers capsizing their canoes.

Alarmed, the man rushed back downriver to Downstream. He asked the doctors and the hospital administrators and the lifeguards and even the mayor to come walk Upstream to see what was causing the drownings and to help stop them. But their responses were all the same: "We don't have time." "We're too busy saving lives."

"We don't have the resources." "Somebody else will have to do it." "Who's going to pay for us to go Upstream?" "Besides, how can we be sure if we can stop what's going on?" And everybody lived happily ever after.

This story is a tragic account of the way things are in the field of alcohol abuse and alcoholism today. House Bill 796 will allow us to spend some real time and effort "Upstream". If we are ever going to impact the enormous social and health problems caused by alcohol, we must reorder our priorities and allocate a reasonable share of our resources to the prevention of alcohol-related problems: I'm not saying close down Downstream's hospital, let's just work together.

I strongly support the passage of House Bill 796. It is financed in a fair way and provisions for the delivery of efficient and effective prevention programs are contained within the bill. This is one of the most important public health bills of this legislative session. I urge your support for and active promotion of the passage of this bill.

Exhibit C
HB 796
2/18/83

Missoula, Montana 59802

THE GARDEN CITY
HUB OF FIVE VALLEYS

February 17, 1983

OFFICE OF CITY ATTORNEY
201 West Spruce Street
Phone 721-4700

83- 130

House Judiciary Committee
Capitol Station
Helena, Montana 59620

Re: House Bill 796

House Judiciary Members:

I want to express my support for the establishment of a drug and alcohol abuse prevention grant program in the State of Montana. I believe that such a grant program could be quite helpful to the public and law enforcment's efforts to curb drunk driving on Montana's highways.

However, I believe that the surcharge (as proposed in the original draft of this Bill) on driving under the influence of alcohol and drug fines is most likely unconstitutional in view of the Montana Supreme Court's decision in State ex rel. Sanders v. City of Butte (1968), 151 Mt. 190, 441 P.2d 190. This 1968 case involved a penalty assessment pursuant to state statute which was assessed on all traffic fines and earmarked for the State Automobile Driver Education Account. The Montana Supreme Court held this penalty assessment to be unconstitutional. See page 194, supra. The statute challenged in the Sanders case, supra, was voided for the reason it indirectly enlarged the jurisdiction of the justice courts and police courts by requiring them to potentially collect monies in excess of the maximum fine that they could statutorily impose. Conceivably the Court reasoned that the lower courts could impose the maximum fine they have authority to impose and then impose the penalty assessment, thereby enlarging their jurisdiction. See page 193, supra.

Yours truly,

Jim Nugent

Jim Nugent
City Attorney

JN/jd

cc: Police Chief Sabe Pfau
Municipal Judge Wallace N. Clark

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE BILL 845 Date Feb. 18, 1983

SPONSOR Rep. Kemmia

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Michael Wood	Mslo Co	Mslo Co Health	✓	
Dinny Dukes	Bozeman, Mt.	MACO		
Albert Barker	Helena	Highway Dept	✓	
Bruce Tooley	Helena	Revenue Services	✓	
Steve Johnson	Helena	Atty Gen's Office	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit D
HB 845
2/18/83

TESTIMONY OF STEVE JOHNSON

ASSISTANT ATTORNEY GENERAL

RE: H.B. 845

H.B. 845 is an immediate suspension law. It provides a rapid and certain means of temporarily suspending or revoking the driving privileges of a person who is found driving a vehicle with an alcohol concentration of 0.10 or greater, as revealed by a chemical blood, breath or urine test.

To date the state has acted summarily to suspend the driving privileges of only those drivers who refuse to submit to a chemical sobriety test following an arrest for driving under the influence. Currently, state law does not authorize similar action against a driver who submits to the test, but "fails" it, i.e. who has an alcohol concentration of 0.10 or greater.

House Bill 845 would provide that authority. Its passage will permit the state to immediately withdraw the driving privileges of a person arrested for D.U.I. prior to conviction if the person either (1) refuses testing or (2) takes the test and is shown to have an alcohol concentration of 0.10 or greater.

Withdrawal of the license under either of those two circumstances occurs in a "summary" administrative action separate and distinct from the subsequent

prosecution for D.U.I. Indeed, with the passage of H.B. 845, Montana law would provide a separate two-track system for dealing with the problems posed by the drunk driver: (1) a non-criminal, remedial, administrative mechanism for quickly removing problem drivers from the road prior to criminal conviction in the interest of public safety and deterrence, and (2) a criminal track for prosecuting and punishing for the offense of D.U.I.

The bill is remedial, not penal, in nature: It gets problem drivers off the road much more quickly than is possible under current law. The purpose of the bill is to deter drunk driving in order to protect the health and safety of other motorists and pedestrians.

There is a clear and urgent need for H.B. 845. Under present law the drivers license of a person who has been arrested for D.U.I. may only be suspended or revoked after conviction for that offense. Unfortunately, convictions are not always fast and sure in drunk driving cases. A backlog of cases in the courts can mean a delay of many months before the criminal charges come to trial. Even where there is no backlog, a defendant who is intent on delaying his conviction can engage in a wide range of dilatory tactics. A conviction can often be avoided altogether through plea-bargaining. Pre-trial and pre-conviction diversion of the defendant out of the criminal justice system altogether is also a possibility: For example, a

prosecutor may defer prosecution of the defendant on the condition that the defendant obtains alcohol counseling. The net effect is the same: Without the conviction, the person may continue to drink and drive.

A quick and rapid method for removing problem drinkers from the road will also serve as a greater deterrent to drunk driving since there will be a more immediate connection between the illegal act and its consequences. The fear of losing a drivers license is a greater deterrent to drunk driving than the fear of imprisonment.

Currently, the states of Minnesota, Iowa, Delaware, Oklahoma,and West Virginia as well as the District of Columbia have summary suspension laws that provide for administrative suspension or revocation of driving privileges upon a determination that a person has been driving under the influence or has an alcohol concentration of 0.10 or greater.

Summary suspension laws of this type have been upheld by the United States Supreme Court as constitutional. A driver's license, whether characterized as a "right" or a "privilege", is a governmental entitlement and a person must be accorded procedural due process, i.e. notice and a hearing before that entitlement is withdrawn. The question is how much process is due.

To determine whether a motorist whose license is withdrawn has been provided with due process, the United States Supreme Court uses a three-part balancing test: It balances (1) the individual's interest in retaining the license (2) together with the risk of an erroneous deprivation under the summary procedures used by the government against (3) the importance of the state interest advanced by use of the summary procedure.

Placing great reliance on the importance to highway safety of the state's interest in removing drunk drivers from the highways quickly, the United States Supreme Court in MACKEY v. MONTRYM, 443 U.S.1 (1978),upheld a Massachusett's statute calling for the immediate suspension of a motorist's drivers license for refusal to submit to an alcohol-breath analysis. Since Massachusetts granted suspended drivers an opportunity for a reasonably prompt, post-suspension hearing, the Court held that the demands of due process had been satisfied.

Exhibit E
HB845
2-18-83

MISSOULA CITY-COUNTY HEALTH DEPARTMENT

301 West Alder · Missoula, Montana 59802 · Ph. (406) 721-5700

I am Michael Wood, M.S., M.P.H., manager of the Missoula County Drunk Driver Prevention Program at the Missoula City-County Health Department. I represent a 30-member task force of many disciplines and organizations concerned about drunk driving. We strongly support House Bill 845.

It is well known that 50% of the 50,000 automobile fatalities (25,000) occurring in this country each year are alcohol related.[1] (In Montana, 60-65% of all drivers killed in traffic accidents had been drinking.[2]) Additionally, 25% of U.S. non-fatal crashes are alcohol related, and drunk drivers are associated with 750,000 injuries per year. Drunk driving is a serious public health problem. It is the number one killer of Americans under age 40 and a very significant cause of death for those over 40.[3]

The immediate administrative suspension of one's driver's license upon arrest and a .10% blood alcohol concentration (BAC) is a reasonable and critical measure that should be mandated. Since the average blood alcohol concentration (BAC) of Montana DUI arrests is .18%, this procedure will largely affect the true "problem drinkers" - who constitute two-thirds of the DUI arrests. This administrative suspension will:

1.) Get the drunk driver off of the road immediately, and protect the public from harm;

2.) Send a message to the public that driving is a PRIVILEGE, not a right, and that this privilege will be suspended if you drink and drive;

3.) Force the "problem drinker" to suffer the natural consequences of his/her drinking behavior and provide a strong indicator and incentive for seeking help for his/her alcohol problem.

This bill, if passed in conjunction with the .10% BAC guilty per se bill (HB 540) and the implied consent penalty increase for refusing a chemical test for DUI (HB 808), will make Montana eligible for a $200,000+ grant from the Federal government to educate the public on the prevention of drunk driving. The passage of these bills coupled with a statewide education program will begin to adequately address this serious public health problem.

The Missoula County Task Force on the Prevention of Drunk Driving supports the passage of House Bill 845.

1. Alcohol Health and Research World, Volume 7, Number 1. Fall 1982.

2. "A Driver's Guide to Drinking", Montana Highway Traffic Safety Division. Undated.

3. "A Manual for Managing Community Alcohol Safety Education Campaigns", National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation. November 1982.

MWW:mjp
2/17/83

Exhibit F
HB 845
2/18/83

Missoula, Montana 59802

THE GARDEN CITY
HUB OF FIVE VALLEYS

February 17, 1983

OFFICE OF CITY ATTORNEY
201 West Spruce Street
Phone 721-4700

83-128

House Judiciary Committee Members
Capitol Station
Helena, Montana 59620

Re: House Bill No. 845 pertaining to drunk driving of motor vehicles and suspension of driving privileges

House Judiciary Committee Members:

I would like to urge your support for House Bill 845 pertaining to drunk driving of motor vehicles and suspension of driving privileges. I believe that existing penalties for (1) refusing to submit to a test to determine blood alcohol content, (2) driving under the influence of alcohol or drugs, and (3) driving on a revoked driver's license are far too lenient when weighed against the death and property damage regularly caused by individuals operating motor vehicles while under the influence of alcohol and/or drugs.

House Bill 845 will help strengthen the penalties imposed for operating a motor vehicle while under the influence of alcohol or drugs. House Bill 845 is a valuable Bill for the reasons that it (1) will aid in serving as a stronger deterrent to individuals operating a motor vehicle while under the influence of alcohol or drugs; (2) penalize individuals who do in fact operate motor vehicles while under the influence of alcohol or drugs; and (3) help in keeping the individual caught operating a motor vehicle while under the influence of alcohol or drugs from operating a motor vehicle on the highways for a short period of time, thereby lessening the chance that during this short period of suspension or revocation this individual will again be operating a motor vehicle while under the influence of alcohol or drugs.

Driving under the influence of alcohol or drug offenses are very serious offenses with severe impacts on society for which existing state law fails to provide severe enough penalties. House Bill 845 is a step toward having the penalties for these types of offenses more adequately reflect the potential dangers

and severe consequences that exist for people and property whenever an operator of a motor vehicle is under the influence of alcohol or drugs. Therefore, I would strongly urge your support for the enactment of House Bill 845. Thank you.

Yours truly,

Jim Nugent
City Attorney

JN/jd

cc: Sabe Pfau, Chief of Police
Judge Wallace N. Clark

MISSOULA COUNTY
OFFICE OF THE ATTORNEY
MISSOULA COUNTY COURTHOUSE
MISSOULA, MONTANA 59802
TELEPHONE: (406) 721-5700

ROBERT L. DESCHAMPS III
COUNTY ATTORNEY

Exhibit G-1
HB845
2-18-83

Betty Wing
Deputy County Attorney, Missoula County

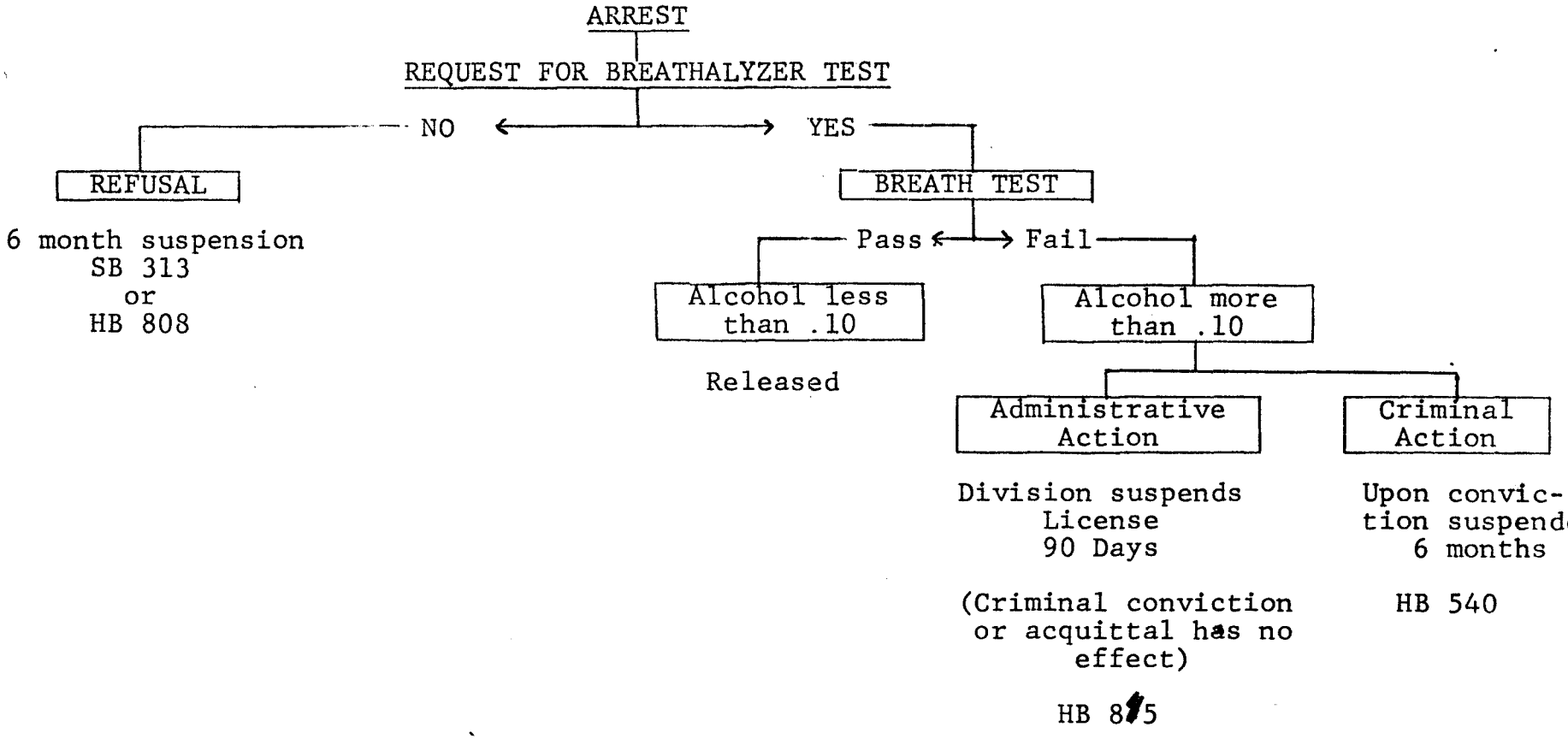
Proponent of House Bill 845

House Bill 845 is the third component of the three changes in Montana law which must occur if Montana is to receive federal funding for the prevention of drunk driving. This component provides for the administrative suspension of a driver's license when the concentration of alcohol in the driver's blood is above .10.

Because the interrelationship among the bills with the various suspension periods becomes confusing, I have attempted to present them in the attached flowchart. I hope it is helpful.

These pieces of legislation will increase the means of combatting drunk driving. Their passage will have even greater value in making Montana eligible for large amounts of federal funds. Our single greatest problem in prosecuting drunk driving is ancient equipment and lack of qualified technicians to operate what we do have. Federal funding can and will be used to provide new equipment and technicians.

Thank you for your support of this package of DUI legislation.


ARREST
REQUEST FOR BREATHALYZER TEST
NO
YES
REFUSAL
6 month suspension
SB 313
or
HB 808
BREATH TEST
Pass
Fail
Alcohol less than .10
Released
Alcohol more than .10
Administrative Action
Division suspends License 90 Days
(Criminal conviction or acquittal has no effect)
HB 875
Criminal Action
Upon conviction suspende
6 months
HB 540

Dave Brown

JUSTICE COURT

JUSTICE OF THE PEACE

PHONE: 563-8421

ANACONDA-
DEER LODGE COUNTY
ANACONDA, MONTANA 59711

TO: TO WHOM IT MAY CONCERN

FROM: Lorraine C. Biggs, Justice of the Peace

SUBJECT: D.U.I. Bill - House Judiciary Committee

This will inform you that I am very much against a D.U.I. bill which would make it mandatory for consecutive days in jail. I believe such a Bill would cause sentencing to be removed from the Courtroom, cause more plea bargaining and would also cause undue hardships on families of the D.U.I. offenders by jeopardizing employment because of a consecutive-day stay in jail.

Thank you for your concern.

Lorraine C. Biggs

Lorraine C. Biggs

cc:

Dated: February 15, 1983

Exhibit H
HB 845
2-18-83

14TH ANNUAL INSTITUTE ON MOTOR VEHICLE
AND TRAFFIC LAW
UNIVERSITY OF COLORADO, BOULDER
August 8 - 12, 1982

SUMMARY SUSPENSION OF DRIVER LICENSES OF DRUNKEN DRIVERS -- CONSTITUTIONAL DIMENSIONS

By John H. Reese*
Professor of Law
University of Denver

PART I. Introduction

Increasingly, public concern has turned toward the problem of drunk driving. Every year, over half of the fatalities occurring on our nation's highways involve persons who are operating motor vehicles while under the influence of alcohol. In response to this concern numerous state legislatures have begun to pass stricter laws to deal with the problem. While the approaches taken by the various states have varied considerably, at the forefront of this

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* My Research Assistant Jim Borgel was instrumental in the researching, drafting and editing of this paper.

movement are statutes which allow a state to suspend summarily a person's driver's license upon the establishment, usually before an administrative officer, of probable cause to believe that the person was operating a motor vehicle while under the influence of alcohol.

These statutes generally are of two types: those that allow suspension without a pre-termination hearing upon the establishment of both probable cause for arrest and the refusal by the driver to submit to an alcohol test, and those which will allow termination upon the certification by the arresting officer that the driver was operating a motor vehicle while under the influence.

An example of the first type of statute is that which was recently enacted in the State of Minnesota. Under Minn. Stat. Sec. 162.123, the Commissioner of Public Safety may summarily suspend an individual's driver's license for a period of ninety days upon certification by an arresting officer (1) that there was probable cause for the officer to believe that the driver was operating his motor vehicle while under the influence of alcohol and (2) that the driver refused to submit to a chemical testing procedure to determine the actual alcohol content in his blood.*

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* At least 13 states allow immediate summary suspension of a driver's license for refusal to submit to alcohol level testing. These include Alabama, Alaska, Delaware, Iowa, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Rhode Island, New Hampshire, and New Mexico.

Although Minnesota does not provide for a hearing prior to suspension, the driver may request an administrative review of his suspension which must be provided within fifteen days following his request. If not satisfied with this administrative review, the driver may then request a judicial hearing.

An example of the second type is W. Va. Code Sec. 17C-5A-2, which allows the summary administrative suspension of a driver's license merely upon the certification by the arresting officer that the driver was operating a motor vehicle while under the influence of alcohol. Much like Minnesota, West Virginia will provide the driver with a post-termination hearing if the driver so requests.

Regardless of which procedure is followed, such summary administrative suspensions of an individual's driver's license raise important questions regarding the provisions of procedural due process. The United States Supreme Court has recognized the fact that once a driver's license has been granted to an individual he acquires a property interest in that license.

> Once licenses are issued, ... their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important rights of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 29 L.Ed. 2d 90 (1971).

Since a person clearly has a property interest in the continued possession of a driver's license, it therefore

must be determined whether summary suspension procedures such as those utilized in Minnesota and West Virginia meet the requirements of procedural due process.

PART II. Traditional Areas in Which Summary Suspension Has Been Allowed

The U.S. Supreme Court traditionally has recognized certain areas in which property may be seized summarily without affording the owner a pre-termination hearing.

These areas have included:

1. Protection of national security during wartime.
2. Protection of the federal government's revenues.
3. Protecting the public against economic injury, such as collapse or mismanagement of banking institutions.
4. Protecting the public health from unsafe food and drugs.**

The concept of summary state action arises from two distinct sources. The first of these is the nineteenth century concept of broad police powers whereby the state is capable of exercising its authority to protect the public health and welfare from either actual or perceived threats to its well-being. Freedman at 3. The second source is the tort law concept that an individual is entitled to use

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** Freedman, "Summary Action by Administrative Agencies, 40 U. of Chi. L.R.1 (1972).

self-help without resorting to legal procedure in order to abate a nuisance. North American Cold Storage v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908).

North American Cold Storage, one of the first cases recognizing the government's power to confiscate property summarily in order to preserve the public health and safety. The case involved the attempted seizure by Chicago authorities of spoiled poultry under the provisions of a municipal ordinance authorizing such a seizure. The owner of the processing plant in which the chickens were held refused to allow the Chicago authorities into the plant and in response they would not allow the owner to further conduct business. The Supreme Court upheld the action of the Chicago authorities, recognizing that the legislature has broad power to protect the health and safety of its citizenry and can determine that because of practical considerations and the perceived threat to public health that a pre-termination hearing is not necessary. "The right to so seize is based upon the right and the duty of the state to protect and guard, as far as possible, the laws and health of its inhabitants." North American Cold Storage, 211 U.S. at 315.

A case similar to North American Cold Storage, also involving food products, is John Quincy Adams v. City of Milwaukee, 228 U.S 572, 33 S.Ct. 610 (1913). In Adams, a dairy farmer who lived outside the City of Milwaukee sought

to enjoin enforcement of a Milwaukee ordinance which allowed summary seizure of mislabeled milk which was attempted to be shipped into the city. The Court upheld the Milwaukee ordinance, recognizing the broad scope of the police power available to protect public health and the fact that confiscation was the only manner in which the city could efficiently prevent the unwholesome milk from being introduced into the market.

Both Adams and North American Cold Storage recognized that practical considerations could allow the state to take summary action against the individual where, as was the case in North American, provision of a pre-seizure hearing would have, at worst, permitted the poultry onto the market during the pre-seizure stage and would have, at best, necessitated the fiscal and administrative burdens of guarding or impounding the meat before and during the hearing. In both cases the Court felt that requiring pre-termination hearings would have defeated the government's substantial interest in preserving public health.

Two later cases recognize that the concept of summary action may be expanded beyond the area of public health and safety. In Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), the Court recognized that the area of permissible summary action includes the take-over and regulation of a savings and loan institution. "The delicate nature of the institution and the impossibility of

preserving credit during an investigation has made it an almost invariable custom to apply supervisory authority in this summary manner." Fahey v. Mallonee, 332 U.S. at 253.

The Fahey Court's determination turned largely on practical considerations and historical precedent. It recognized that in order to maintain public confidence in both the specific institution involved and in the banking system as a whole it was necessary for the government to be empowered to take prompt action in order to remedy the apparent mismanagement of the bank. Further, the banking industry had been traditionally subjected to pervasive regulation.

In Ewing v. Mytinger & Casselberry 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950), the Court allowed the expansion of the summary action concept into the area of mislabeled drugs. The case involved the summary seizure of a misleadingly labeled food supplement (Nutrilite) which was neither dangerous nor harmful to the public health. The Court's decision was based on two considerations. The first was that the legislature has the power to determine those concerns which are serious enough to enable the government to act summarily, and the second was the application of a simple balancing test -- striking a balance between the public good served by the seizure and the private harm which would result:

> Congress weighed the potential injury to the public from misbranded articles against the injury to the purveyor of the article from a temporary

> interference with its distribution and decided in favor of the speedy, preventative device of multiple seizures. We would impair or destroy the effectiveness of that device if we sanctioned the interference which a grant of jurisdiction to the District Court would entail. Ewing, 339 U.S. at 601-602.

Summary action has also been allowed in the areas of securities regulation and government related, private employment. In R.A. Holman & Co., v. Securities & Exchange Commission, 229 F.2d 127 (D.C. Cir. 1962) a broker sued the S.E.C. to have declared invalid a Commission order rescinding the petitioner's exemption from a registration requirement for a specific stock issue. The court held that the summary rescission of petitioner's exemption was constitutional. "In a wide variety of situations, it has long been recognized that where the harm to the public is threatened, and a private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." R. A. Holman & Co. 229 F.2d at 131.

In Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 81 S.C. 1743, 6 L.Ed 2d 1230 (1961) the U.S. Supreme Court allowed the summary suspension of a security clearance granted to a civilian employee working at a secured naval installation. In determining whether or not a pre-termination hearing should have been afforded the civilian employee, the Court again applied a simple balancing test similar to that used in Ewing.

" ...[C]onsideration of what procedures due process

may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Cafeteria & Restaurant Workers Union, 367 U.S. at 895.

The Court also recognized that due process is not a fixed standard to be applied to all cases but rather is dependent upon a balancing of both the nature of the private interests and of the public interests involved. "The Fifth Amendment does not require a trial type hearing in every conceivable case of government impairment of private interest....The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Cafeteria & Restaurant Workers Union, 367 U.S. at 894-95.

The cases referred to in this section have generally been classified as emergency doctrine cases. However, Ewing v. Mytinger & Casselberry, Fahey v. Mallonee, and Cafeteria & Restaurant Workers Union v. McElroy amply demonstrate that the so-called emergency doctrine is often applied in situations which do not necessarily involve emergency conditions. Rather, the Court seems generally to apply a balancing test in which the importance of the governmental interest is set off against the degree of private harm which will result from the summary deprivation of property. Included in this calculus are numerous factors: (1) the degree to which the governmental objective will be defeated

by the providing of a prior hearing, (2) practical considerations including administrative and fiscal burdens, and (3) the degree to which the private interest will be harmed as a result of the summary seizure of the property.

In addition, when upholding summary action, the Court has recognized that the injured person will have a private tort action against any public officers who abuse their authority. North American Cold Storage v. City of Chicago, 211 U.S. 306, 316.

Part III. The Mathews v. Eldridge Standard For Due Process

More recent cases have further refined the balancing test which the Court will apply in order to determine whether or not a hearing is necessary prior to the deprivation of a property interest. The test which the Court has relied upon most recently is that which was set out in Mathews v. Eldrige, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976).

Although the test originally applied in Mathews was used to determine what type of hearing was necessary prior to the deprivation of a property interest, later cases have used the same test in order to determine whether any hearing is needed before the government may act. The test is expressed in the following language from Mathews:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such

> interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the government's interest, including the function involved and the fiscal or administrative burdens that the additional procedures would entail. Mathews, 424 U.S. at 334-35.

Implicit in the Mathews analysis is the consideration of two additional factors. The first of these, related to the nature of the private interest affected, is the degree of deprivation which the private party will suffer. The Court has indicated that the severity of deprivation can be determined by examining two factors: the degree to which the private parties may be compensated for their loss of property and how long they will be deprived of their property until some type of a post deprivation hearing is afforded. Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed 2d 321 (1978). Secondly, when considering the nature of the government's interest, it is also proper to consider whether or not that interest would be defeated or severely limited by the time delay which is inherent in the provision of a hearing.

A. The government's interest in maintaining highways

Applying the Mathews analysis to the situation whereby a driver's license is suspended summarily when a driver is arrested for drunk driving suggests that the Supreme Court would allow such action. The Supreme Court has several times recognized that the maintenance of highway safety and

the prevention of automobile accidents are an important state interest. "Far more substantial than the administrative burden is the important public interest in safety on the roads and highways, and the prompt removal of the safety hazard." Dixon v. Love, 431 U.S. 105, 114, 97 S.Ct. 1723, 52 L.Ed. 2d 172 (1977). More recent cases have directly analogized the suspension of a driver's license upon refusal to take alcohol blood-level tests to the situations which were present in North American Cold Storage and Ewing. "We have traditionally accorded the states great leeway in adopting summary procedures to protect public health and safety. States surely have at least as much interest in removing drunken drivers from their highways as in summarily seizing mislabeled drugs or destroying spoiled food stuffs." Mackey v. Montrym, 443 U.S. at 17 (1978).

B. The nature of the private harm as a result of summary suspension

In order to apply the Mathews v. Eldridge analysis to driver's license suspensions, the nature of the private interest must also be examined. The Court has recognized that while the property interest which a driver holds in his driver's license is important, it is not of the same magnitude as are other interests, i.e., disability payments. "Unlike the Social Security recipients in Eldridge, who at least could obtain retroactive payments if their claims were subsequently sustained, a licensee is not made entirely

whole if his suspension or revocation is later vacated. On the other hand, a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence." Dixon v. Love, 431 U.S. at 113.

The degree to which a driver may suffer such irrevocable harm will depend, to a large extent, upon the length of time the driver is without a license prior to the hearing. "The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact of official action on the private interest involved." Mackey v. Montrym, 433 U.S. at 12 (1978). Therefore, in order for a summary suspension to comply with the Mathews v. Eldridge due process standard, the state should provide some type of post-suspension hearing almost immediately. This approach has been followed in virtually all states which allow such summary suspensions.

C. The risk of error inherent in summary procedures

Finally, the third part of the Mathews analysis must be applied to determine the likelihood of an erroneous deprivation as a result of summary drivers license suspensions and whether an alternative method would suffice. The current Court seems to believe that the risk of such an erroneous deprivation is small in relation to the important governmental interest which is served by removing a drunk driver from the highways.

In Mackey v. Montrym, 443 U.S. 1, even the existence of a factual dispute as to whether the defendant had refused a breathalyzer test did not shake the Court's confidence in the initial report of an arresting officer. ". . . [w]hen disputes as to historical facts do arise, we are not persuaded that the risk of error inherent in the statute's initial reliance on the respresentation of the reporting officer is so substantial in itself as to require that the Commonwealth stay its hand pending the outcome of any evidentiary hearing necessary to resolve questions of credibility or conflicts in the evidence." Mackey v. Montrym, 443 U.S. at 15.

PART IV. The Mackey v. Montrym Decision

The Court's current attitude toward the summary suspension issue can best be understood by a careful reading of Mackey v. Montrym, 443 U.S. 1 (1978), discussed earlier. Mackey involved the summary suspension of an individual's driver's license for refusing to submit to an alcohol breath-analysis test following his arrest for driving under the influence. In accordance with the relevant Massachusetts statutory provision, the arresting officer certified to the registrar of motor vehicles that he had probable cause to believe that Montrym had been operating his automobile while under the influence of alcohol and that Montrym had refused to take a breathalyzer test. The registrar then summarily suspended Montrym's license.

Chief Justice Burger, writing for the majority, upheld the constitutionality of the Massachusetts law, holding it to be a valid exercise of legislative authority in advance of the cause of highway safety. In his opinion, the Chief Justice applied the three step analysis used in Mathews v. Eldridge in coming to his conclusion. This included an examination of: (1) the nature of the private interest being abrogated by governmental action; (2) the possibility that the summary suspension of Montrym's driver's license would result in an erroneous deprivation; and (3) the importance of the governmental interest being advanced by the use of summary procedures.

In addition to ruling favorably for the state on all three parts of the Mathews analysis, the majority was unable to distinguish Mackey from Dixon v. Love, 431 U.S. 105 (1977), an earlier case which involved the summary administrative revocation of a driver's license. In Dixon, the Court upheld summary suspension and distinguished it from the earlier driver's license suspension case of Bell v. Burson, 402 U.S. 535 (1971) which concerned the constitutionality of a Georgia statute mandating the suspension of a driver's license when its holder was involved in an accident but failed to post a sufficient bond to cover any potential civil liability for damages. Unlike Bell, both Dixon and Mackey concern a matter about which the

state has a great deal of concern; namely, highway safety.* This factor fully distinguishes Bell v. Burson, where the only purpose of the Georgia statute there under consideration was "to obtain security from which to pay any judgments against the licensee resulting from the accident," Bell v. Burson, 402 U.S. at 540. Dixon and Mackey, however, both "...involve the constitutionality of a statutory scheme for administrative suspension of a driver's license for statutorily defined cause without a pre-suspension hearing. In each, the sole question presented is the appropriate timing of the legal process due a licensee. And, in both cases, that question must be determined by reference to the factors set forth in Eldridge." Mackey v. Montrym, 443 U.S. at 11.

In Mackey, a 5-4 decision in which Stewart, Brennan, Marshall and Stevens dissented, much of the majority's support for the Massachusetts statute was based on the fact that under the Massachusetts law a driver whose license was suspended was provided with an immediate post-suspension hearing before the registrar if he so desired. In the majority's judgment, this provision of the statute was relevant to two factors of the Mathews analysis. First, by

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* See Chrisner v. Complete Auto Transit, 645 F.2d 1251 (6th Cir. 1981) where a civil rights action was defeated because the company's hiring procedures, while in effect discriminatory, were related to the goal of maintaining safe highways.

minimizing the amount of time during which Montrym could be wrongfully deprived of his license, the Court felt that the first factor of the Mathews analysis, the degree of private harm suffered as a result of the summary action, would be minimized. Second, the majority also felt that providing a prompt post-suspension hearing would minimize the chance that a license would be suspended erroneously, the second factor of the Mathews analysis.

While the Mackey Court felt that providing a prompt post-suspension hearing was a major factor in allowing the Massachusetts statute to stand, it did not feel that the fact that the suspension was predicated wholly upon the report of the arresting officer was a threat to the statute's constitutionality. Rather, the Court seemed to feel that the arresting police officer would be in a better position to determine if the driver had been violating the drunk-driving laws than would the registrar. "The officer whose report triggers a driver's suspension is a trained observer and investigator. He is, by reason of his training and experience, well suited for the role the statute accords him in the pre-suspension process." Mackey v. Montrym, 443 U.S. at 14. Also see Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed. 2d 365. Furthermore, as discussed earlier, any abuse of discretion by the police in regard to the pre-suspension process would expose the officer to personal liability for any harm suffered by the licensee. See supra, at 10. This, the Court felt, was a sufficient safeguard to

minimize the risk that a license would be suspended erroneously.

Balanced against what the Mackey Court saw as a minimal deprivation of property and a low risk of error is the strong governmental interest in highway safety. See supra at 11. While much of the dissenting opinion in Mackey focused on the fact that the Massachusetts statute was merely a penalty for failure to cooperate with the police, the majority opinion firmly acknowledged the statute's relation to the "paramount interest the Commonwealth has in preserving the safety of its public highways...." Mackey v. Montrym, 443 U.S. at 17. The result in Mackey was that the Court upheld the summary suspension of Montrym driver's license despite the lack of a pre-suspension hearing.

While the four Mackey dissenters have by now probably been pared to three with the departure of Justice Stewart, they did bring out two points which may be useful in attempting to draft a statute allowing summary suspension. The first of these is the penal appearance of the Massachusetts law. While those who refuse the Massachusetts breathalyzer test will suffer the suspension of their driver's licenses, those who take the test and fail will not be exposed to the same fate unless a conviction is obtained. Such a conflicting approach weakens any argument that the purpose of the law is to remove drunk drivers from the highways. Secondly, the dissenters denigrated the value of the post-suspension hearing provided in Mackey. Instead of

considering the merits of the suspension, the registrar was statutorily limited to a consideration of whether the officer's report contained sufficient data upon which to base a suspension (i.e., probable cause and refusal) and to an examination of the report for clerical errors. Such a narrowly limited review was not thought to be sufficient since the registrar has essentially no power to prevent suspension when provided with a report which meets the statutory requirements. In addition, under the Massachusetts approach, the licensee was not informed of his right to a post-suspension hearing. Such a failure, in the dissenters' opinion, further prejudiced the licensee and was another factor in their conclusion that the Massachusetts statute had denied Montrym procedural due process.

The import of the Mackey decision is that the current Court is willing to allow the use of summary proceedings for the suspension of a driver's license upon arrest for drunk driving. Furthermore, if a state were to provide a prompt (probably within 10 days) post-suspension hearing at which the substantive issues could be considered by an officer with discretion to overturn the suspension, even the dissenters in Mackey may be persuaded to support summary action.

The Burger Court's receptiveness to the interests served by a summary suspension has also been indicated in several more recent cases involving similar actions. In Barry v. Barchi, 443 U.S. 55 (1979) the Court upheld the

summary suspension of a horse trainer's license upon a showing that one of his animals had raced while some illegal drugs were in it's blood. In Barry, the Court recognized that the harm to the individual trainer as a result of the summary action could be severe. However, they also indicated that the state had a strong interest in maintaining the integrity of the racing system and that initial reliance upon the report of an expert who administered the blood test to the horse was acceptable. Summary action was therefore appropriate. However, Barry emphasizes that even under the Burger Court, a prompt post-suspension hearing must be afforded the licensee in order to validate the summary action. The need for a prompt post-suspension hearing has also been emphasized in Ciechon v. City of Chicago, 634 F.2d 1055 (7th Cir. 1980) in which the summary suspension of firefighters following an internal investigation was upheld. There, the court, citing Barry v. Barchi, emphasized that summary action was permissible only if the employees were provided with a prompt later hearing.

PART V. Conclusion

A. The model for analysis

In summary, the U.S. Supreme Court has declared the relevant analysis to apply to summary suspension of driver licenses to be that of Mathews v. Eldridge. It so stated in Dixon v. Love and Mackey v. Montrym. Although it did not state specifically that the appropriate analysis was that of

Mathews v. Eldridge, in Barry v. Barchi the U.S. Supreme Court approached the question of summary suspension of a horse trainer's license in a similar fashion.

Therefore, the current attitude of the Court toward summary suspension of licenses is Mathews as amplified by principles extracted primarily from four other cases. They are: Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586 (1971); Dixon v. Love, 431 U.S. 105, 97 S.Ct. 1723 (1977); Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612 (1979); and Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1979). By relating the principles of these cases to the three factors of analysis set forth in Mathews, we may synthesize and describe the manner in which the Mathews factors may be expected to be applied to summary suspension of a driver's license upon arrest for driving while under the influence.

1. Mathews Factor No. 1: "The private interest that will be affected by the official action."

First, all four Supreme Court cases agree that a driver's license is an entitlement which may be taken away by the state only by procedures which meet 14th Amendment standards of due process of law. Beginning with the premise that due process principles apply, the initial evaluation concerns the degree of the deprivation of a private interest. That is, to what extent may the private party be compensated for loss of the interest and how long will the party be deprived of that interest until some sort of post-deprivation hearing and resolution is provided. Mackey.

Where a driver's license has been suspended, there is no way in which the private party may be fully compensated for its loss during the period of the suspension. Although there is a possibility of some sort of recovery in damages, the fact remains that the licensee cannot be made whole for the loss of use of the motor vehicle for the period of suspension. Similarly, where a horse trainer summarily loses his license, which is later restored, there is no way that the trainer can be adequately compensated for loss of the clients collected over the span of his career. Barry (concurring opinion). Conversely, where a party is erroneously deprived of disability benefits, the benefits wrongfully withheld may be paid after determination of the right to receive them.

Nevertheless, government may be in a position to minimize the degree of deprivation by providing for some type of restricted permit during the suspension period. Dixon. Similarly, the shorter the period of deprivation the stronger becomes the position of the state in taking summary action. The Supreme Court sustained a potential ninety days' loss of a driver's license for refusal to submit to a breath test when arrested for drunken driving in Mackey. In Dixon the Supreme Court upheld license revocation for an indefinite period where the driver's license had been suspended three times within a period of ten years.

Distinct from the issue of the term of the license suspension is the question of the promptness of the state in

affording a post-suspension hearing which could rectify any mistake in imposing the suspension. In Mackey the Court demonstrated its concern with the timing of the post-suspension hearing by interpreting the statute to provide for an immediate "walk-in" hearing. In Dixon, a delay of 20 days before hearing was possible, but the Court held the procedures to meet the requirements of due process of law.

2. Mathews Factor No. 2: "The risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."

Where the summary license suspension is based on official records (e.g., prior traffic offense convictions) the Court appears to assume that the basic facts are not in dispute, that any dispute has been resolved, or that any opportunity to dispute them has been waived. Dixon. Where the basic facts are disputed, the Court will address the question of whether the procedures followed in making an ex parte determination of the basic facts are sufficiently reliable to justify a delay in resolving issues of credibility and conflict in the evidence. Mackey, Barry. Where the state procedures require an affidavit of an arresting officer, endorsed by a third person, and endorsed by the police chief, the Court will conclude that the risk of error is insubstantial. Mackey.

This is true because due process of law does not mandate "perfect, error-free determinations." Mackey. So long as the procedures are designed to provide a reasonably reliable basis for concluding the facts are as a responsible government official warrants them to be, the Court considers such procedures to be in accordance with due process of law. Mackey, Barry. Furthermore, the question of risk of error is to be controlled by the generality of cases and not by those cases which could be termed the "rare exceptions." Mackey. Thus, where the procedures indicate that the private interest is not being "baselessly compromised" the ex parte findings of fact will generally be accepted. Barry.

3. Mathews Factor No. 3: "The government's interest, including the function involved and the fiscal or administrative burdens that the additional procedures would entail."

Where it is mentioned, in all four cases the Justices of the U.S. Supreme Court are unanimous in agreeing that if a genuine emergency situation exists, the state may act summarily to suspend a license, provided post-suspension procedures meet due process standards. However, the Justices may not agree that, in fact, the situation presents a genuine emergency. Thus, in Mackey, the Court divided on this issue. The majority held that the state interest in removing drunken drivers from the highways was at least as justifiable as summarily seizing mislabeled drugs or

destroying spoiled foodstuffs. (Citing Ewing and North American). The dissenters contended that the purpose of the suspension for refusing to submit to a breath test was not based upon emergency but was in truth based upon failure to cooperate with the police. They made the point that if removing drunk drivers from the highways were a genuine concern of the state, it would also suspend the licenses of persons who submit to a breath test and where the results show that the licensee was driving in violation of the law. However, where the public interest can be shown to be that of promoting safety on the roads and highways and prompt removal of safety hazards there seems to be little disagreement among the Justices. It appears that virtually all of them would agree that such a state interest is indeed important, acute, and perhaps, compelling. Dixon, Mackey.

Another consideration in the Mathews analysis is whether the government interest would be defeated or severely limited by the time delay inherent in providing a pre-deprivation hearing. Mackey. The majority in Mackey believed the government interest would be defeated or limited if a pre-deprivation hearing were required since a high-risk driver would be free to continue driving during the pre-hearing interval. However, the dissenters believed that the government interest was not removing drunken drivers from the highways, but was, instead, punishing them for failure to cooperate with the police. Hence, the situation was such that no valid government interest would

be demonstrably disserved by delay. Mackey (dissenting opinion). The dissenters in Mackey further stated that such ex parte deprivations are permitted by due process of law only when clearly necessitated by the exigencies of law enforcement. To them refusal to submit to a breath test was not such an exigency.

As further elaborated by the Court, in these four cases, the Mathews v. Eldridge analysis would appear to support the constitutionality of a state statute providing for the summary suspension of a driver's license upon being arrested for driving while under the influence. Such a statute should be designed as follows:

1. The legislature should include in the statute a statement of purpose making clear that the government interest is that of protecting the safety of persons on the roads and highways by quickly removing persons who have shown themselves to be safety hazards by driving while under the influence.
2. The statute should provide for the prompt submission of proper affidavits by the arresting officer and, perhaps, they should be verified by a third person in order to establish the reasonably reliable factual basis for summary suspension which the cases require.
3. The licensee should be given immediate notice of the fact that his license will be suspended as a

collateral consequence of his arrest for driving while under the influence and he should be given immediate notice of the fact that an opportunity for a prompt post-suspension hearing is available. The notice should give adequate information to the licensee as to how that hearing process is to be implemented if he chooses to contest the suspension.

4. The statute should provide procedures for a "speedy," "early," "prompt," or "immediate" hearing opportunity in which the hearing officer has authority to resolve any basic factual dispute and to provide prompt relief to the licensee in the event of improper suspension.

5. Finally, the hearing officer should be authorized to conduct a hearing, the scope of which is broad enough to permit consideration of all factors relating to the adequacy of the grounds for the arrest for driving while under the influence.

B. The (Administrative) Civil Sanction -- Criminal Sanction Distinction

Finally, it should be understood that summary suspension of a driver's license for arrest for driving while under the influence is completey independent of any criminal prosecution for the offense alleged. That is, the disposition of the criminal charge has no bearing on the validity of the suspension. The law is well established that persons may be sanctioned both criminally and civilly for the same

conduct, for double jeopardy does not apply to the civil sanction. Furthermore, because the two sanctioning processes are completely independent, if a drunk driving charge is dismissed or is plea bargained to a lesser offense, or if the trial results in an acquittal, the summary suspension remains valid. For example, persons convicted of felonies may,as a collateral consequence of the conviction, be denied veterans' employment preferences, veterans' benefits, the opportunity to be buried in a national cemetery, the right to vote (permitted by the Fourteenth Amendment) and similar civil sanctions.

In Helvering v. Mitchell, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938), the Supreme Court determined the propriety of an attempt by the IRS to impose civil tax penalties on a taxpayer who had been acquitted of tax fraud. The Court stated:

> That acquittal on a criminal charge is not a bar to a civil action by the government, remedial in nature, arising out of the same facts on which the criminal proceeding was based has long been settled...[w]here the objective of the subsequent (civil) action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy...Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." 303 U.S. at 397, 93 S.Ct. at 632.

Suspension of a driver's license upon arrest for drunken driving is remedial and not punitive. Its purpose is to remove a safety hazard from the highways.

Similarly, the U.S. Supreme Court has held that collateral estoppel does not bar the application of civil forfeiture penalties to a person who brings gem stones into the country illegally, but who is acquitted on criminal charges for lack of intent. One Lot Emerald Cut Stones and One Ring v. U.S., 409 U.S. 232, 93 S. Ct. 489, 34 L. Ed. 2d 438 (1972). The Court stated:

> Moreover, the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel. The acquittal of the criminal charges may only have represented an 'adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused.'" 409 U.S. at 235, 93 S.Ct. at 492.

The latest U. S. Supreme court case on this question is United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636 (1980). It involved an action brought by the United States to collect a "civil penalty" imposed for discharge of oil from a retention pit into navigable waters. The Court held the statutory penalty to be civil and said it does not trigger the protections afforded a criminal defendant. It referred, with approval, to a list of factors relevant to determing whether a so-called civil penalty is "remedial" or "punitive" in character. The Mendoza-Martinez factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.... Kennedy v.

Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554; 372 U.S. at 169-169, 83 S.Ct. at 567-578.

In Ward, the Court indicated the Mendoza-Martinez list is neither exhaustive nor conclusive on the issue, but applied it to conclude that the statutory civil penalty was not punitive in nature. Only the clearest proof will suffice to show that such a civil penalty is punitive in either purpose or effect.

For further discussion of the concept and citations of other authorities, see Ch. 17, Sec. 14 "Restrictions Resulting from Arrest Without Conviction," in S. Rubin, Law of Criminal Correction, at 718 (2d ed. 1973); "The Collateral Consequences of a Criminal Conviction," 23 Vand. L. Rev. 929 (1970).

WITNESS STATEMENT

Name DAVID E. BAUMAN Committee On JUDICIARY

Address BOX 142 - ENNIS, MT Date FEB. 18, 1983

Representing _____ Support YES

Bill No. H.B. 768 Oppose _____

Amend _____

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. SEE ATTACHED SHEET -

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

WITNESS STATEMENT

Name RON BURGESS Committee On JUDICIARY

Address 219 EAST MENDENHALL BOZEMAN Date 2-18

Representing SURVCO Support ✓

Bill No. HB 768 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. I AM LICENSED SURVEYOR & HAVE HAD DIFFICULTY GAINING ACCESS TO MONUMENTS ON PRIVATE LAND THAT
2. THE SURVEYING LAW REQUIRES ME TO USE.
3.
4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Board

WITNESS STATEMENT

Name Robert S. Custer Committee On Judiciary

Address PO Box 3416 Date 2/18/83

Representing MARLS Support X
Montana Association of Registered Land Surveyors

Bill No. HB-768 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments: See Attached Poll

1.

2.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE BILL 768 Date Feb. 18, 1983

SPONSOR Rep. Wallin

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Bob Mobley	Ashland			X
Michael Foley	Bozeman	Mont. Assoc. of Reg. Surveyors	✓	
Walter Coffman	Dutton	Self		X
Tony Bozeman	Bozeman	Surveyor	✓	
Howard C. Bozeman	Ennis	Surveyor	✓	
Robert S. Custer	Missoula	MARKS	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

WITNESS STATEMENT

Name MICHAEL FOLEY Committee On JUDICIARY

Address 219 E. MENDENHALL Date 2-18-83

Representing _____ Support ✓

Bill No. H.B. 768 Oppose _____

Amend _____

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. REASON FOR BILL IS THE INCREASING INCIDENCE OF PROPERTY OWNERS DENYING SURVEYORS ACCESS ONTO THEIR LANDS DURING THE COURSE OF A SURVEY.
2. FEDERAL & STATE LAWS & REGULATIONS SPECIFY PROCEDURES WE MUST FOLLOW TO DIVIDE A SECTION OF LAND. — OFTEN WE MUST GO ONTO THESE LANDS IN ORDER TO COMPLETE SURVEY.
3. WE ARE NOT TRYING TO TAKE AWAY ANY RIGHTS — BUT RATHER ARE TRYING TO GUARANTEE EVERY LANDOWNER
4. THE RIGHT TO HAVE THEIR LAND SURVEYED.

- THIS EXHIBIT WILL SHOW THE BASIC PROCEDURES WE MUST FOLLOW AS WELL AS WHY ACCESS ONTO LANDS OF ADJOINERS.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

Exhibit G-2
SB 768
2/18/83

PRESIDENT
Robert S. Custer
P.O. Box 3416
Missoula, Montana 59806
(406) 728-1880

VICE-PRESIDENT
James L. Tillotson
P.O. Box 3109
Missoula, Montana 59806
(406) 728-1880 or 251-2777

MONTANA REGISTERED LAND SURVEYORS ASSOCIATION

PRESIDENT-ELECT
Charles A. Wright
Rt. 2, Box 7
Stevensville, Montana 59870
(406) 777-3669

SECRETARY-TREASURER
Charles D. Conklin
P.O. Box 3418
Missoula, Montana 59806
(406) 728-4611

P.O. Box 4112
Missoula, Montana 59806

265 Total Sent
93 Replys
35%

QUESTIONNAIRE - Jan. 3, 1983
76-3-406 Surveyor Right of Access

TO ALL MEMBERS OF MARLS		YES	NO
1.	Do you think this kind of legislation is necessary?	91% 85	8
2.	Do you think government employers should be granted the same access as Montana Professional Surveyors and their subordinates?	76% 71	20
3.	Should only property boundary surveys be the type of surveys intended to be covered by this Act?	43% 40	49
4.	Should engineering surveys for route location requiring right-of-way purchase be included in the Act?	62% 58	32
5.	Should all surveying be included in the Act... Engineering, Topographics, etc.?	46% 43	47
6.	Have you ever had a problem obtaining access?	70% 64	26
	6a) If yes, how many times? 266		
	What would you estimate the total cost to your clients to be? $137,000.00		
	6b) If yes, how much total time did it add to the projects? 830 Crew days		
7.	Were you ever unable to complete a proper boundary location because you were denied access? (Please give very brief description of corners you were denied access to and their effect on your survey)	15% 14	62
8.	Would you be willing to testify at a public hearing when this legislation is before committee?	43	36

Robert S. Custer
PO Box 3416
Missoula, Mt. 59806

NOTES

Survco located in Bozeman, Montana since 1971.

Supervised over 1,500 surveys.

Experienced difficulty obtaining access to survey on numerous occasions.

I have been forced to change my instructions to employees from one of making a great effort to contact adjoining owners fro permission to one of trying to not make contact with adjoiners. If they say "no" we have no recourse.

A few examples:

1) Surveying for State Fish & Game at Three Forks; an out-of-state owner of a horse ranch hoped to prevent a public fishing access.

2) Surveying for Forest Service over a disputed line for a timber sale near Bridger Bowl. Adjoiner hoped to prevent harvest of timber on public land.

3) Surveying for Gallatin County rancher to create various 20-acre tracts for sale as recreational sites; adjoining rancher did not wish his neighbor to sell.

4) Survey for Bridger Canyon rancher to define boundary of the land his father had homesteaded in late 1800's. The adjoining owner insisted an old meandering fence was good enough and did not wish a true survey. My client went all the way to the Supreme Court and won.

5) Survey near Clyde Park where old rancher wished to use a portion of his ranch to establish a trust fund for his grandchildren. Adjoining rancher would not allow us to enter his land; prevented the survey and ultimately purchased the 1/4 section of land in question at a very low price. Nice neighbor - both parties native Montanan's!

FEBRUARY 18, 1983

DAVID E. BOWMAN - BOX 142 - ENNIS, MONTANA 59729 - 682-4920
LAND SURVEYOR
U.S. MINERAL SURVEYOR

I HAVE BEEN DENIED ACCESS TO PRIVATE PROPERTY SEVERAL TIMES IN THE PAST, THE LATEST ENCOUNTER WAS LAST SPRING.

IT CAME ABOUT WHEN A RANCH CORPORATION WAS SOLD. THE WIDOW OF ONE OF THE CORPORATE OWNERS WAS NOT SATISFIED WITH THE SALE PRICE AND WANTED TO RETAIN HER PORTION OF THE PROPERTY OUT OF THE SALE. SHE ENGAGED ME TO SURVEY THE BOUNDARIES OF HER PROPERTY FOR FENCING PURPOSES.

THE BUYER OF THE BALANCE OF THE RANCH, HAVING TAKEN POSSESSION, DENIED ACCESS TO SEARCH FOR THE SECTION CORNERS NECESSARY TO SEGREGATE HER PROPERTY. IT TOOK APPROXIMATELY 2 MONTHS TO NEGOTATE FOR ACCESS!

MONTANA SURVEYORS ARE REQUIRED, UNDER SECTION 76-3-402(3), M.C.A. AND SUB-CHAPTER 30, 22.6.3001(c), M.A.C., TO USE THE PROPER CONTROL CORNERS IN DOING PROPERTY SURVEYS, HOWEVER THE PRESENT STATE LAW DOES NOT PROVIDE FOR A SURVEYOR'S RIGHT OF ACCESS TO USE THESE CORNERS.

I FEEL THAT HOUSE BILL 768 WILL REMEDY THIS.

THANK YOU

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE BILL 769 Date Feb. 18, 1983

SPONSOR Wallin

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Jerry Raning	Helena	Mt Auto Dealers Assn	✓	
Gary Marcus		Mt Veh. Div.		

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

WITNESS STATEMENT

Name Bill Rooney Committee On Judiciary

Address Helena Date 2-18-83

Representing Wrecking Yards Support X

Bill No. HB 769 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. A Person who, thru his skill and ability, has increased the value of a person's property should have a lien on that property. We recognize that theory with mechanic liens, logger liens etc.

2. In this day of tight economy, many persons cannot afford to pay the full amount of their Repair bills in one lump sum. Without this law, the mechanic has only one Recourse. He must keep possession of the vehicle. This hurts everyone. the mechanic must maintain storage space and the owner loses the use of his automobile.

3.

4.

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

FORM CS-34
1-83

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

ILL HOUSE BILL 761 Date 2/18/83

NSOR Addy

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Marla Gray	Butte	MTL	X	
John S. Yoder	Billings	Yellowstone Valley Cleaners & Laundry Assoc.	X	
Jim Murry	Helena	Mont. AFL-CIO	X	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Exhibit I
HB761
2-18-83

STATE AFL-CIO
MONTANA
APRIL 30 1956

Box 1176, Helena, Montana

JAMES W. MURRY
EXECUTIVE SECRETARY

ZIP CODE 59624
406/442-1708

TESTIMONY OF JAMES W. MURRY, MONTANA STATE AFL-CIO FEBRUARY 18, 1983

HB 761 HOUSE JUDICIARY COMMITTEE 8:00AM

I am Jim Murry, Executive Secretary of the Montana State AFL-CIO. I am here today in strong support of House Bill 761. This bill provides for the addition of two workers' compensation judges.

The Montana AFL-CIO supported the creation of the Workers' Compensation Court in 1975. We believe the independent workers' compensation court system is a sound one, and has been of great benefit to Montana workers. However, the caseload has increased so much, that it is impossible for the court to keep up with those cases in order to issue timely decisions.

The state of California has 115 workers' compensation judges. Based on population, Montana's workers' compensation Judge Reardon has three times the caseload of each of these California judges.

In Fiscal Year 1981, there were 211 petitions filed. In Fiscal Year 1982, there were 351, the largest number in the court's history. From July 1, 1982 to the end of January, 1983 there have been 262 petitions filed already. During the same period the year before, there had been 186. It is clear that the caseload is continuing to increase dramatically.

In addition, all compromise cases must be reviewed and approved by the workers' compensation judge. In Fiscal Year 1981, there were 580 cases for review and approval. That number increased to approximately 750 in Fiscal Year 1982. From July 1, 1982 to the end of December, 1982 there were already 400 compromise cases, with the number for this fiscal year expected to go well over 800.

While the court is still able to hear cases promptly, it is falling behind in issuing decisions. Not only has the caseload increased, so has the length of time for hearings. The Supreme Court has ruled that the Workers' Compensation Court can no longer rule from the bench, but must have an order, finding

of facts and conclusions of law, so that the decision is appealable. This also takes more time.

What these delays mean of course, is that an injured worker, who may have no other source of income, goes without workers'compensation insurance to which he or she is entitled. It means that a worker not only suffers illness or injury, but has no money, while medical bills pile up, along with other living costs.

Another problem the delays create is with the payment of court reporters and medical experts. Most of the medical testimony submitted to the court is taken by deposition. The cost to the client would be much higher if the doctors had to appear in court. The deposition is taken by a court reporter. Both the doctors and the court reporters are entitled to be paid in a reasonable amount of time.

If this situation is not remedied, eventually injured workers will not be able to submit medical testimony. The law requires that the doctor testify under oath that an injured worker has a physical impairment. Medical records are not admissable as evidence.

It has been said that " justice delayed is justice denied". We believe that adding two workers' compensation judges will prevent the denial of justice to Montana's injured workers.

Please vote for House Bill 761.

Thank you.

E J
HB 761
2/18/83

TESTIMONY IN SUPPORT OF HB761

SUBMITTED BY

JOHN S. YODER

February 18, 1983

STATEMENT

I am testifying on behalf of HB761, a bill to increase the number of workers' compensation judges, in two capacities.

The first is as a representative of the Yellowstone Valley Claimants' Attorneys Association. This is a group of 52 attorneys in and around Billings who for the most part represent claimants in workers' compensation cases and plaintiffs in other types of litigation. They have had great collective experience practicing before the Workers' Compensation Court. Members of the Association tried over 85% of the cases on behalf of claimants before Judge Reardon in the last September term of the Court when the Judge heard cases in Billings.

The Association has passed a Resolution supporting HB761 which can be found attached as Exhibit "D"

I am also testifying in favor of HB761 as an individual attorney who practices before the Court.

The Need

There is no question that Judge Reardon has been swamped with the caseload of workers' compensation cases. This in no way is a criticism of Judge Reardon. He has been faced with an increasing caseload while at the same time, the Montana Supreme Court has also placed additional pressure on the Judge by demanding his written decisions give detailed reasons for his judgments.

This increase in the caseload, the number of cases to be heard and decided by the Court, along with the demand of the Supreme Court that each case have a detailed Findings of Fact and Conclusions of Law to support the decision has resulted in unavoidable delay to the claimants. This is the issue. The injured worker who must wait months before finding out if he or she is covered by workers' compensation, without funds in the meantime, or to determine what their benefits will be is the person harmed by the system.

Attached as Exhibit "A" are four cover sheets from recently published decisions of the Court. Please examine these carefully to determine the length of time it took from the date the case was submitted to the Judge to the date a decision was reached or "docketed."

It has been proposed that the best solution for the situation would be to have one or more hearing examiners, working under the Judge, hear the cases and make proposed decisions. This in my opinion would help only slightly, if at all. Why do I believe this, please examine Exhibit "B" which is attached.

This is the cover sheet of a case recently decided where a hearing examiner was used. What is required? The Judge must still review the record and issue the judgment under our administrative procedures. This still leaves a bottleneck in the system. The problem may be no better if Judge Reardon becomes involved in hearing appeals of the hearing examiner's decisions.

The only permanent and useful solution to the problem of delay of decisions for the injured worker is to add additional judges with concurrent jurisdiction to the one position we now have.

Objections

There appear to be two persistent objections to the bill. The first is that there will be different authority or divided authority if the judges rule differently in similar cases. This is not an objection voiced by members of the Association. Currently, any attorney in Montana may appear, depending upon the location of the case, before any of over 30 district court judges. There is no way around this and I believe attorneys have long ago accepted the inherent problems. The Montana Supreme Court is the arbiter of this kind of problem and should serve the exact same role for multiple workers' compensation judges.

The second objection is the cost. The differential between a hearing examiner and a judge is not great. Both require secretarial support, offices, a court reporter, and with the exception of a law clerk and a greater salary for a judge, the two would be similar.

The main point I wish to raise is that whatever method of easing the Court's burden is, that method is not to be funded from the general fund. The administrative fund out of which the Court's expenses are paid is created by and supported by the industry itself through fee assessments. The appropriate statute is found in Exhibit "C." Nothing in HB761 would change that if the third judge were to be dropped.

Conclusion

The need of the injured worker who must wait months for a decision must be given priority over any other consideration. The system must have relief in order to accomplish the goals of the Workers' Compensation Act.

VOL. II
No. 80

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF KALISPELL
BEFORE THE WORKERS' COMPENSATION JUDGE
* * * * * * * * * * * * * * * *

JOSEPH T. BUBY,

Claimant,

vs.

MONTGOMERY WARD & COMPANY,

Employer,

and

MONTGOMERY WARD & COMPANY,

Defendant.

Docket No. 1412
Court File No. 1181-185
Claim No. 1-80-00978-9
County: Flathead
Area: Kalispell
Heard: April 7, 1982
Submitted: May 13, 1982

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

Mr. James E. Vidal
Attorney at Law
MURRAY, KAUFMAN, VIDAL & GORDON, P.C.
P.O. Box 899
Kalispell, Montana 59901-0899

ON BEHALF OF THE CLAIMANT

Mr. Richard Dzivi
Attorney at Law
DZIVI, CONKLIN & NYBO
P.O. Box 1291
Great Falls, Montana 59403-1291

ON BEHALF OF THE DEFENDANT

* * * * * * * * * * * *
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT
* * * * * * * * * * * *

VOL. II
No. 76

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF BILLINGS
BEFORE THE WORKERS' COMPENSATION JUDGE
* * * * * * * * * * * * * * * *

IRENE KAY EHRMANTRAUT,

Claimant,

vs.

PIERCE PACKING COMPANY,

Employer,

and

STATE COMPENSATION INSURANCE FUND,

Defendant.

Docket No. 1546
Court File No. 482-60
Claim No. 3-80-07826-1
County: Yellowstone
Area: Billings
Heard: May 18, 1982
Submitted: July 19, 1982

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

Mr. William T. Kelly
Attorney at Law
WILLIAM T. KELLY, P.C.
P.O. Box 20976
Billings, Montana 59104-0976

ON BEHALF OF THE CLAIMANT

Mr. William B. Dunn
Chief Legal Counsel
DIVISION OF WORKERS' COMPENSATION
815 Front Street
Helena, Montana 59601

ON BEHALF OF THE DEFENDANT

* * * * * * * * * * * * *

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

* * * * * * * * * * * * *

VOL. II
No. 74

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF MISSOULA
BEFORE THE WORKERS' COMPENSATION JUDGE
* * * * * * * * * * * * * * *

KENNETH EVANS,

Claimant,

vs.

EVANS EXCAVATING,

Employer,

and

WESTERN CASUALTY
SURETY COMPANY,

Defendant.

Docket No. 1537
Court File No. 382-62
County: Missoula
Area: Missoula
Heard: June 10, 1982
Submitted: June 29, 1982

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

Mr. Edward A. Cummings
Attorney at Law
CUMMINGS LAW FIRM
P.O. Box 8181
Missoula, Montana 59807-8181

ON BEHALF OF THE CLAIMANT

Mr. Larry E. Riley
Attorney at Law
GARLINGTON, LOHN & ROBINSON
P.O. Box 7909
Missoula, Montana 59807-7909

ON BEHALF OF THE DEFENDANT

* * * * * * * * * * * *
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT
* * * * * * * * * * * *

VOL. II
No. 73

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF BUTTE
BEFORE THE WORKERS' COMPENSATION JUDGE
* * * * * * * * * * * * * * * *

MARY K. NORMAND,

Claimant,

vs.

CYPRUS INDUSTRIAL MINERALS COMPANY,

Employer,

and

TRUCK INSURANCE EXCHANGE,

Insurer.

Docket No. 1196
Court File No. 1281-138
Claim No. 2-80-05939-5
County: Madison
Area: Butte
Heard: May 19, 1982
Submitted: June 18, 1982

Presiding Judge: THE HONORABLE TIMOTHY W. REARDON

Counsel of Record:

Mr. Norman H. Grosfield
Attorney at Law
UTICK, GROSFIELD & UDA
P.O. Box 512
Helena, Montana 59624-0512

ON BEHALF OF THE CLAIMANT

Mr. Lyman H. Bennett III
Attorney at Law
P.O. Box 460
Bozeman, Montana 59715-0460

ON BEHALF OF THE INSURER

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

* * * * * * * * * * * * *

VOL. II
No. 77

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA
IN AND FOR THE AREA OF GREAT FALLS
BEFORE THE WORKERS' COMPENSATION JUDGE

* * * * * * * * * * * * * * * *

DELLA HITCHCOCK,

Claimant,

vs.

PROPERTY RENTALS, INC.,

Employer,

and

GENERAL INSURANCE COMPANY OF AMERICA,

Defendant.

Docket No. 721
Court File No. 182-213

ORDER ADOPTING PROPOSAL FOR DECISION AND JUDGMENT

* * * * * * * * * * * *

The above entitled matter was heard by Roger Tippy, a Court-appointed Hearing Examiner, on May 24, 1982, and September 17, 1982, and deemed submitted on November 1, 1982.

This Court having examined the file and the documents contained therein and read the Findings of Fact and Conclusions of Law proposed by the Hearing Examiner, hereby makes the following

ORDER AND JUDGMENT

IT IS HEREBY ORDERED that the Findings of Fact and Conclusions of Law of the Hearing Examiner dated November 17, 1982, are adopted by this Court.

IT IS ADJUDGED AND DECREED that the Claimant, by her counsel, promptly advise the Court in writing as to whether she elects to pursue further medical treatment as indicated in Conclusion of Law No. 4 or to accept a permanent partial disability rating as indicated in Conclusion of Law No. 6. If she elects to pursue further medical treatment as indicated, the Defendant's petition shall be dismissed.

IT IS FURTHER ADJUDGED AND DECREED that the Defendant is liable for the Claimant's attorney's fees and witness costs, under 39-71-612, MCA, to be set by the Court after all appeals have been exhausted or time therefore expired.

IT IS ALSO ORDERED that the Clerk of this Court mail a copy of this Order and Judgment to all interested parties.

DATED December 14, 1982, at Helena, Montana.

WORKERS' COMPENSATION JUDGE

EXHIBIT B
PAGE 1/1

Part 2

Administrative Provisions
Division of Workers' Compensation

39-71-201. Administration fund. (1) A workers' compensation administration fund is established out of which all costs of administering the Workers' Compensation and Occupational Disease Acts and the various occupational safety acts the division must administer are to be paid upon lawful appropriation. The following moneys collected by the division shall be deposited in the state treasury to the credit of the workers' compensation administrative fund and shall be used for the administrative expenses of the division:

(a) all fees and fines provided in 39-71-205 and 39-71-304;

(b) all fees paid for inspection of boilers and issuance of licenses to operating engineers as required by law;

(c) all fees paid from an assessment on each plan No. 1 employer, plan No. 2 insurer, and plan No. 3, the state insurance fund. The assessments shall be levied against the preceding calendar year's gross annual payroll of the plan No. 1 employers and the gross annual direct premiums collected in Montana on the policies of the plan No. 2 insurers, insuring employers covered under the chapter, during the preceding calendar year. However, no assessment of the plan No. 1 employer or plan No. 2 insurer shall be less than $200. The assessments shall be sufficient to fund the direct costs identified to the three plans and an equitable portion of the indirect costs based on the ratio of the preceding fiscal year's indirect costs distributed to the plans using proper accounting and cost allocation procedures. Plan No. 3 shall be assessed an amount sufficient to fund its direct costs and an equitable portion of the indirect costs as referred to above. Other sources of revenue, including unexpended funds from the preceding fiscal year, shall be used to reduce the costs before levying the assessments.

(2) The administration fund shall be debited with expenses incurred by the division in the general administration of the provisions of this chapter, including the salaries of its members, officers, and employees and the travel expenses of the members, officers, and employees, as provided for in 2-18-501 through 2-18-503, as amended, incurred while on the business of the division either within or without the state.

(3) Disbursements from the administration money shall be made after being approved by the division upon claim therefor.

History: En. 92-116.1 by Sec. 1, Ch. 253, L. 1973; amd. Sec. 1, Ch. 318, L. 1975; amd. Sec. 28, Ch. 453, L. 1977; R.C.M. 1947, 92-116.1; amd. Sec. 18, Ch. 104, L. 1979.

EXHIBIT C
PAGE 1/1

YELLOWSTONE VALLEY CLAIMANTS ATTORNEYS ASSOCIATION

Stephen C. Mackey
President

John S. Yoder
Vice-President

RESOLUTION

BE IT RESOLVED that the Yellowstone Valley Claimants Attorneys Association supports proposed legislation creating additional judges for the Workers' Compensation Court.

Passed on unanimous vote 1/18/83.

EXHIBIT D
PAGE 1/1

Exhibit K
HB761
2-18-83

WITNESS STATEMENT

Name Karla Gray Committee On Judiciary

Address Butte Date 2/18/83

Representing Mont. Trial Lawyers Assoc. Support X

Bill No. 761 Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

An additional workers comp judge (or judges) is necessary to prevent the backlogs and delays presently being encountered in having comp. claims adjudicated. Injured workers are often in truly dire and desperate straits by the time their cases are heard and decisions rendered; they need the benefits under the workers comp act to keep their heads above water during very difficult times for themselves and their families. Additional hearing examiners do not resolve the problem, as the bottleneck between the work of the examiners and the necessity of the workers comp judge reviewing and concurring remains. Any concern that more than one workers comp judge would be inconsistent

Itemize the main argument or points of your testimony. This will assist the committee secretary with her minutes.

decisions is the main objection to the workers comp. area then would be a suggestion that based on that concern, we should only have

FORM CS-34
1-83

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

ILL HOUSE BILL 808 Date February 18, 1983

NSOR REP. KITSELMAN

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Michael Wood	Missoula Co	Mda City-Co Health	—	
~~[illegible]~~	~~[illegible]~~			
[illegible]	1515 Burlington Ave	Mdco	✓	
Harry Majerus		Motr Vehicle Div.	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

MISSOULA CITY-COUNTY HEALTH DEPARTMENT
301 West Alder · Missoula, Montana 59802 · Ph. (406) 721-5700

Exhibit L
HB 808
2-18-83

I am Michael Wood, M.S., M.P.H., manager of the Missoula County Drunk Driver Prevention Program at the Missoula City-County Health Department. I represent a 30-member task force of many disciplines and organizations concerned about drunk driving. We support the primary intent of House Bill 808, but would suggest two changes in its text.

It is well known that 50% of the 50,000 automobile fatalities (25,000) occurring in this country each year are alcohol related.[1] (In Montana, 60-65% of all drivers killed in traffic accidents had been drinking.[2]) Additionally, 25% of U.S. non-fatal crashes are alcohol related, and drunk drivers are associated with 750,000 injuries per year. Drunk driving is a serious public health problem. It is the number one killer of Americans under age 40 and a very significant cause of death for those over 40.[3]

Immediate 6 month suspension of a driver's license upon refusal to submit to a chemical test to determine blood alcohol concentration (BAC) is a strong and appropriate measure to reduce the significant public health problem of drunk driving. Nationally, problem drinkers constitute two-thirds of all DUI arrests.[4] This far exceeds the percentage of the driving population they constitute: about 13%.[5] These pepole need treatment for problem drinking. Alcohol treatment

programs are almost unanimous in operating on the premise that a first step in such treatment is for problem drinkers to suffer the full and natural consequences of their actions. Having a driver's license immediately suspended for refusing a chemical test to determine BAC is and should be a consequence of driving drunk.

This action protects the public health in two ways. It prevents drunk drivers from driving and threatening the lives and health of the public. And it strongly encourages problem drinkers to be moved toward treatment when they cannot be shielded from the consequences of their drinking and driving.

Reluctance to take this strong action because of a general feeling of "There but for the grace of God go I" is simply unfounded. In Montana, the average BAC of persons arrested for DUI is 0.18% (Montana Department of Highway Information.) Legal intoxication is 0.10% or greater. And a BAC of 0.15% strongly indicates the alcohol tolerence of a problem drinker. Most DUI arrests, then, involve people with drinking problems who have drunk far in excess of one to two social drinks.

Currently the penalty for refusing a chemical test is an ineffective 60 day suspension of driver's license, which has resulted in a 30% refusal rate. If penalties for refusing a chemical test for DUI are equal to penalties for DUI convictions, i.e. six months, the DUI suspect is more likely to submit to that test. This again sets in motion the

process previously described of moving problem drinkers to treatment via the courts and protecting the public health from the hazards of drunk driving. And - it will be a strong message to the public and individual drivers that drunk driving will not be tolerated in Montana.

However, there are two provisions of the bill that are seriously flawed. First, the penalties for 2nd and 3rd offenses are the same as the 1st offense. This should be changed to make the 2nd and 3rd offense penalties progressively stiffer.

Second, the provision of a temporary occupational license upon suspension of a license because of refusing a breath test is entirely self-defeating of the primary intent of this bill. If this monstrous loophole remains in the bill, the result will likely be that even fewer (if any) persons will submit to the breath test in hopes of pleading a hardship case. And if current practices in the courts hold, most will get the temporary license. We cannot let this happen!

The passage of this bill (if ammended with our suggestions) along with the .10% BAC guilty per se bill (HB 540) and the bill providing for administrative suspension of a driver's license upon a DUI arrest (HB 845), will make Montana eligible for a $200,000+ grant from the Federal government to educate the public on the prevention of drunk driving. The passage of these bills coupled with a statewide education program will begin to adequately address this serious public health problem.

The Missoula County Task Force on the Prevention of Drunk Driving supports the passage of House Bill 808, with our two suggested changes.

1. Alcohol Health and Research World, Volume 7, Number 1. Fall 1982.

2. "A Driver's Guide to Drinking", Montana Highway Traffic Safety Division. Undated.

3. "A Manual for Managing Community Alcohol Safety Education Campaigns", National Highway Traffic Safety Administration (NHTSA), U.S. Department of Transportation. November 1982.

4. "Alcohol and Traffic Safety", NHTSA. 1981.

5. Daniel Sinawski, Colorado Department of Highways: DUI Training School, Missoula, Montana, 1982.

MWW:mjp
2/17/83

2-18-83
HB808
Exhibit m

Missoula, Montana 59802

THE GARDEN CITY
HUB OF FIVE VALLEYS

February 17, 1983

OFFICE OF CITY ATTORNEY
201 West Spruce Street
Phone 721-4700

83-129

House Judiciary Committee Members
Capitol Station
Helena, Montana 59620

Re: House Bill 808 pertaining to suspension of a driver's license for refusing to submit to a blood alcohol test

House Judiciary Committee Members:

I have long believed that existing state law penalties applicable to individuals who operate motor vehicles while under the influence of alcohol or drugs are far too lenient when balanced against the dangers and severe consequences, often fatal, that are caused by the operator of a motor vehicle who is under the influence of alcohol or drugs. Therefore, I strongly support the portion of House Bill 808 that increases from sixty (60) days to six (6) months the driver's license suspension period for an individual who has refused to submit to a requested chemical test designed to determine the individual's alcohol content in his/her blood.

However, I oppose the portion of House Bill 808 that would allow a person who refuses to submit to a requested chemical test to determine the alcohol content of his/her blood to obtain a temporary occupational driver's license. Existing state law does not authorize a temporary occupational driver's license to individuals who refuse to submit to a requested chemical test to determinethe alcohol content of their blood. State law does allow a probationary driver's license to a first offender in a five-year period who either pleads guilty to or is convicted of the offense of driving under the influence of alcohol or drugs.

Prosecutors at this time experience difficulties in prosecuting some driving under the influence of alcohol cases for the reason that an individual is willing to lose his/her driver's license for sixty (60) days rather than submit to a chemical test that will clearly establishthat they are under the influence of alcohol to the extent that they exceed the legal presumption point for being under the influence of alcohol. Sixty (60) days' suspension of their drivers' licenses is not much of a penalty to them, if they believe they may be able to avoid conviction by refusing to submit to a chemical test to determine the alcohol content of their blood. The absence of chemical test results in this type of case is obviously going to weaken the prosecution's case in many instances.

Authorizing a temporary occupational driver's license will increase the likelihood that an individual will refuse to submit to a chemical test. This will be especially so for bus and truck drivers, delivery persons, traveling salespersons, etc. who can easily qualify for a temporary occupational driver's license. Thus, an obvious result of authorizing a temporary occupational driver's license when a person refuses to submit to a chemical test will be to weaken the prosecution's case which in turn weakens the overall effort to reduce the incidenceof drunk driving in the State of Montana.

Philosophically, I can support the concept of a temporary occupational driver's license for convicted offenders after their conviction. However, I must strongly oppose the allowance of a temporary occupational driver's license prior to conviction. When it in essence encourages individuals to refuse to submit to a chemical test. Further, it should be noted and emphasized that there appears to be a far higher incidence of refusal to submit to a chemical test by the second, third, fourth, etc, offender. The multiple offenders are the individuals that it is most important to get off the roadways for the reason they obviously have an alcohol problem.

The portion of House Bill 808 allowing a temporary occupational driver's license is a step backward in the overall effort to curb drunk driving in the State of Montana. Therefore, I urge that you remove the temporary occupational driver's license provision from House Bill 808 and enact the provision increasing the period of suspension of the driver's license from sixty (60) days to six (6) months. Increasing the period of total suspension of the drivers' licenses will (1) aid in the prosecution of drunk driving offenders; (2) serve as a stronger deterrent to drunk driving; (3) aid in the overall effort to reduce drunk driving in the State of Montana; and (4) I understand will allow the State of Montana to be eligible for federal grant funds to use in the war against drunk driving.

Thank you for your consideration of my comments.

Respectfully,

Jim Nugent
City Attorney

JN/jd

VISITORS' REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE BILL 787 Date Feb. 18, 1983

SPONSOR Rep. Bergene

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Earl J Donovan	Gt. Falls	Gt Falls Pre-release Board	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.