MINUTES OF THE JUDICIARY COMMITTEE
April 19, 1983

The meeting of the House Judiciary Committee was called to order by Chairman Dave Brown at 12:30 p.m. in room 224A of the capitol building, Helena, Montana. All members were present except REPRESENTATIVE DAILY, who was excused. Brenda Desmond, Staff Attorney for the Legislative Council, was also present.

HOUSE JOINT RESOLUTION 47

REPRESENTATIVE VINCENT, District 78, Bozeman, stated that this is a unique kind of study resolution, because it does not call for a legislative committee and it does not call for an appropriation, but it would mandate an interim study to examine the status of Montana-Canadian relations and provide recommendations on how state government can become better equipped to deal with border issues with a little assistance from the Legislative Council. He indicated that the study would be conducted by the 49th Parallel Institute at Montana State University and the funding would involve about $10,000.00, but none of it would require a legislative appropriation.

MIKE FITZGERALD, President of the Montana Trade Commission, pointed out that the largest trade area for Montana is the provinces of Alberta and Sashatchewan; and he himself knew more about Tokyo than he does about the provinces. He indicated that they support the passage of this bill.

There were no further proponents and no opponents.

REPRESENTATIVE VINCENT closed.

REPRESENTATIVE KEYSER asked how come they were so late in getting this in. REPRESENTATIVE VINCENT replied that he was late because the 49th Parellel was late and a lot of work went into this over the last several months.

CHAIRMAN BROWN indicated that the 49th Parellel appeared before the Environmental Quality Council back in December with this concept in a general form, but he thought that they were trying to be sure they could put together the private funding that was needed before they came in with the idea. He thought they were fairly confident that they can do that now, but it took them a fair amount of time to get to that point.

REPRESENTATIVE CURTISS asked where is the other funding going to come from. REPRESENTATIVE VINCENT replied that there is no other funding; there is just funding; they figure they need $10,000.00 to do the study and they are experienced in obtaining grants, primarily from private sources. He emphasized that it would all be grant money of one kind or the other and there would be no funding from the legislature. He felt they have an extensive list of groups and organizations that they think they can solicit to obtain this funding.

REPRESENTATIVE CURTISS asked if there was anyone from the 49th Parallel Institute here.

STEPHEN BAILEY, representing the 49th Parallel Institute, testified that they operate on grant sources, primarily from Canadian business firms, but they are seeking a lot of support from within the United States. He commented that there is a lot of interest in improving Montanan's knowledge about Canada.

REPRESENTATIVE CURTISS asked if they were working toward getting any reciprocity agreements or anything of that sort. MR. BAILEY responded not at the moment. MR. FITZGERALD replied that they do not know what the areas of cooperation are going to be; they are defining now what the relationship will be as far as the university systems, the government and the trade structures; they don't even know the dollar amounts (how much we sell there and how much they sell to us) right now; so this is a vehicle to define what is the importance of the relationship between our state and Canada.

REPRESENTATIVE CURTISS asked if they have contacts with the International Border Commission and is there any effort by anyone to gather information on helping us in regard to the border crossings. MR. FITZGERALD replied that the International Border Commission is not part of the 49th Parallel Institute but that is precisely the kind of agenda issues they will address; i.e. opening the borders so that Montanans and Canadians can go back and forth.

REPRESENTATIVE EUDAILY asked if this study does not include a legislative committee. REPRESENTATIVE VINCENT responded that, as the resolution is written, that is true; though there would be no problem with having legislative involvement even though it was not mandated in the resolution.

CHAIRMAN BROWN noted that the Environmental Quality Council would have a continuous relationship with the 49th Parallel Institute because of the problems in the eastern part of the state and the things that are going on above Glacier Park; and there are a number of things on both sides of the border that are advantageous for each to watch.

REPRESENTATIVE IVERSON mentioned the Poplar River and Cabin Creek; and one particular area that Dr. McKinzie has been looking at is the idea of a cooperative water storage on the Milk River, for example; and he felt that their job now is to figure out what they might be able to do.

REPRESENTATIVE EUDAILY asked if this could be done without this resolution. REPRESENTATIVE VINCENT replied that this is one of the efforts that the Institute is making to put the backing of Montana state government behind the effort to make the study and solicit funds; he knew there was cooperation forthcoming from the governor's office and with an indication from the legislature that there is support of this kind of effort, it would make the raising of money much easier.

CHAIRMAN BROWN pointed out that it sends a signal to the Canadian government that the legislative branch of government of Montana is interested in these relationships as well.

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

EXECUTIVE SESSION

HOUSE JOINT RESOLUTION 47

REPRESENTATIVE KEYSER moved that this bill DO PASS. The motion was seconded by REPRESENTATIVE JENSEN.

REPRESENTATIVE JENSEN commented that he hoped they could enter into a reciprocity agreement, but he hoped it wouldn't include acid rain because he didn't want to get any of that stuff back.

The motion carried unanimously.

SENATE BILL 465

SENATOR TURNAGE, District 13, stated that this was a bill, which was requested by the Senate Judiciary Committee and he requested Senator Towe to co-sponsor the bill with him. He indicated that the bill was intended to address a problem that was created by a supreme court decision in the case of White vs. the state of Montana, that was handed down on April 8; the opinion struck a section from our statutes that placed a limit on sovereign immunity lack of (?) liability on state and local government; the opinion also addressed some questions of what is called economic and non-economic damages; but that is not the point of this bill. He continued that the bill is intended to reestablish the maximum or the cap on the amount of liability of state and local government; it also has some important language about state interest; that has to do with some of the language in the court opinion; he felt that without the bill state and local government's potention exposure to tort liability is unlimited; that the people voted and approved the constitutional amendment that allowed the legislature to address the limitation of governmental liability; and he felt that Senator Towe could explain it a little more.

SENATOR TOWE, District 34, Billings, stated that he was chairman of the interim committee that studied sovereign immunity in 1977 following the 1975 session, leading up to the passage of the law that was involved in the court case. He commented that prior to that time the constitution did not allow any sovereign immunity originally; it was amended allowing sovereign immunity only upon a two-thirds vote of each house of the legislature; following that passage, there was an enormous amount of legislation proposed that would remove the liability of cities and counties, towns, governments and the state for all kinds of things; (the laundry list of items that they got in the 1975 session suggesting that sovereign immunity be reinstated was enormous - they wanted sovereign immunity for everything); they successfully avoided those bills; they threw it into a subcommittee - an interim committee -

and they studied it over the interim. He indicated that Senator Turnage and he were both on that committee; the solution they came up with was that they did not want a laundry list of things for which the city is not liable, or the county is not liable, or the state is not liable, such things as when a highway patrol is pursuing a speeding motorist, should they be liable or shouldn't they be liable; when the fairgrounds committee supports some activity, should they be liable or shouldn't they. He continued they felt they should be liable on everything; but they were going to put a limit of the amount of damages, so that people will be protected if they have been done wrong to; if they have suffered injuries, they should be able to collect from the state, but they recognized that there is a limit; the state does have a deep pocket, it is true; the state can usually afford large amounts of damages, but they do not want to break the local governments, cities, counties and other governments so they are going to put an upper limit on the amount that can be sued for; and that limit was $300,000.00 and $1 million. He advised that they also did another thing and they said that it was not quite so important if you have noneconomic damages, and they were going to disallow such damages, but they will allow economic damages, essentially medical costs, doctor bills, hospital bills, the cost of reimbursing someone that has to be hired to do something that you did before, work loss, and all those things, but not for pain and suffering, the defamation, those noneconomic damages they disallowed. He explained that the supreme court has now said that they can't do that; they, in effect, have said very clearly that it is discriminating against injured parties to say that one suffers economic damages, for which one can recover, but if one suffers noneconomic damages, one cannot recover. He contended that they can argue whether or not that that is a good idea, but that is the law of the land in the state of Montana. He noted that the supreme court also said that the $300,000/$1 million limit would be inconsistent if they didn't strike it too, because then you could collect only up to $300,000.00 for economic damages, but you are unlimited on noneconomic damages; and that would be an anomaly that should not be permitted, so they struck down the $300,000/$1 million limit as well; but the implication from Judge Morrison's opinion is very clear, i.e. if the legislature finds a compelling state interest to reinstate that $300,000/$1 million

limit, then it may do so; and that is what this bill attempts to do. He noted that in section 2 on the bottom of page 5, the first paragraph there, that is the meat of the bill - $300,000.00 for each claimant and $1 million for each occurrence - that is the limit of damage that can be obtained against a sovereign. He stated that they recognized that there was evidence that with unlimited liability, some of these communities could not just afford insurance to cover it all; and he is not sure the state could afford it; consequently, he felt that there really is a compelling state interest. He cited an example wherein a fairly well-to-do city, such as the city of Billings, which operates the airport, a worker at the airport was loading some petrol gasoline into an airplane; some gasoline spilled; somebody dropped a cigarette and it exploded with 150 people on the plane; the liability to the city of Billings could be astronomical; not to mention the several million dollars it would cost to the airline company for the airplane; and all because of the negligence of an employee of the airport. He declared that they would really be in trouble; now add to that the kinds of problems you get in a small community - a little tiny community like Bear Creek for instance - how many accidents could they afford if they couldn't get the insurance. He added that the first five pages of the bill attempt to bolster their case for a compelling state interest; he thought what he just told them is, in fact, a compelling state interest and that is what they are asking the committee to find that there is a compelling state interest to impose this kind of liability. He suggested that they may want to consider, but he does not think that it is absolutely critical, adding one more and that is some specific figures that are not in the bill at the present time that there has been a total of 562 claims made since the bill took effect on July 1, 1977; and of those, about 44 per cent (247) actually stated how many dollar in damages that they were claiming; 56 per cent didn't even state how many dollars they were claiming; and of the 44 per cent that stated an amount, that came to $83.9 million; and that is just against the state; and he felt that that was very significant because that is a lot of money; and that, if nothing else, shows a compelling state interest. He indicated that he would be happy to answer any questions.

MIKE YOUNG, Administrator of the Insurance and Legal Division of the Department of Administration, passed out to the committee a proposed amendment to this bill. See EXHIBIT A. He stated that his job is to manage all the claims against the state and self-insure or insure against those liabilities; what they should realize, in looking at the figures that he passed out, is that the state does commercially insure a number of its activities - they insure aircraft, they insure their boilers and their property; and they do have liability insurance on the state auto fleet for $300,000 per person and $1 million per occurrence. He advised that the state self-insures its comprehensive general liability; all sorts of errors and omissions, the institutions, the prison, the basic decisions that are made, liability for professionals and non-professionals in the state and they include the university system.

He informed the committee that they handled the Karla White litigation as well; basically what the supreme court did there was reject the notion adopted by most states that immunity is not an equal protection question; our court decided that it was; and once it decided it was, it determined that just a rational basis for the statute was not sufficient, that a compelling state interest has to be demonstrated. He continued that basically what the court said was that the financial implications at the time simply do not warrant or justify the compelling state interest.

He indicated that it has since been suggested that the existing $300,000/$1 million limits could be reimposed and even had a proposed bill in it; the majority opinion indicates by implication that some limits might be justified; but it would be up to the legislature to determine some compelling state interest; so they have to look at what sort of things the legislature has considered over the years.

He said that the study that Senator Towe referred to had a number of different alternatives that the 1975-1977 joint

judiciary subcommittee looked at; they looked at a number of specific limits, examined the statutes of states all over this part of the country and, as Senator Towe indicated, there were so many specific immunities that even that was rejected. He continued that the 1977 legislature considered also setting up a separate court system like the workers' compensation, but that was rejected; finally they tried to propose legislation with a sense of balance for the inequities; and the fundamental thing they have to remember is that a state is not a business; there is language in the opinion that indicates that the state is a business and ought to be liable as a profit-making enterprise and one of the costs of doing business is its liability. He asserted that the shareholders of many corporations voluntarily assume that activity for a profit and know exactly what they are getting into; but the government has its duties imposed by law; very few of them would actually generate a profit on their own; and its aim is to protect society. He noted that you have to remember that the state is not some aimless thing out there that can be attacked; it is basically us and the people we represent and the taxpayers.

He commented that the claims information is so very interesting and the handout that was passed out is wrong already, as of today there are 564 claims and 146 lawsuits as two came in yesterday; out of that 564 claims they now have 146 existing lawsuits; and 258 claims and lawsuits have been won, paid or settled since the initiation of this program on July 1, 1977. He advised that it is a significant fact that a number of claims have prayer amounts in them for what the claim is for (that is the lawyers' term for saying what they want) and 44 per cent of all the claims filed have indicated an amount, and they are looking at just about $84 million; 56 per cent of the claims are bodily injury claims, which under some recently enacted legislation, you cannot plea a specific prayer for damages that comes later; that is primarily what that 315 claims consist of is bodily injury claims without a prayer. He explained that the $4,382,684 figure for reserved losses is their agency's estimate of what the remaining claims and lawsuits are worth if you apply the noneconomic and economic distinctions and the statutory limits of liability. He indicated that a number of people have asked them what those claims are worth now that the supreme court has

knocked off the caps and they quite honestly cannot say; it would require an examination of each case; but the bodily injury blue sky ? portion of any major bodily injury claim could easily amount to a half million, he would suspect. He explained that he also gave them a rendition of their outside counsel fees and this includes the A.G.s and the attorneys' pool and it does not include the cases that are handled by the two full-time attorneys in their own office that do this work. He noted that they can see from the progression of attorneys' fees how litigation progresses costwise. He advised that on the end is out-of-pocket losses that they have actually paid with checks for claims and judgments in settlements to date and it comes up to just about $2,750.000.00; so that is where they are on that. See Claims Information - EXHIBIT B.

He noted that there were some trial lawyers here and a number of them have been in his office the last couple of days trying to get information and he is sure that they are going to try and convince the committee that this sort of legislation still is though it is probably better than what we had before; his reaction to that is that Montana is certainly not being unfair in comparison to our sister states; he did a survey yesterday by phone; and just for their information, Wyoming, which waived immunity last year, has a $500,000.00 cap on all claims for single occurrence; Colorado and Oregon have identical statutes - they are $100,000.00 per person with $300,000.00 per occurrence limit; and Oregon additionally has a $50,000.00 limit on property damage - the $100/300,000 only goes to bodily injury; the state of Nevada recently raised their limits from $25,000.00 to $50,000.00; and the attorney general in North Dakota informed me that they don't have any liability - they are at zero. He commented that all of these states that have these caps also in their court legislation have certain specified things that you can't sue for at all, which they do not have in this bill; for example, collecting taxes, highway design operations, national guard, use of unimproved natural lands of the state; many of them contain that type of exclusion. He felt that they should be able to see the seriousness of the problem and he would be happy to answer any questions.

MIKE STEPHEN, representing the Montana Association of Counties, said that they strongly support this bill; there should be a liability limit; that local governments are very interested through their elected officials and employees in providing a variety of services and activities for the public and also to the citizens of the community; and they feel that as a result of an act or omission in regard to an employee or an officer of the local government that there is fairness in this particular bill to the individual and there also should be fairness to the towns and local governments, as the citizen is providing the moneys and would be held responsible for paying the bills. He indicated that they feel this bill has fairness on both sides.

ALEC HANSEN, representing the Montana League of Cities and Towns, stated he wanted to talke about a compelling local interest; the average city in the state of Montana has a taxable value of about $3.4 million; in applying an average mill levy of 80 mills against that taxable value, you come up with a tax finance budget of the average city in Montana of about $275,000.00; and without an insurable on tort liability, one major case could totally devastate the average Montana city; one major case could wipe out the whole tax finance budget of $275,000.00; and for that reason, they support this bill.

CHIP ERDMAN, representing the Montana School Boards' Association, stated that they also strongly support this bill; he felt that everything has been said that is pertinent to the area; but he felt that by eliminating any limitation at all, it is virtually impossible now for any governmental entity to obtain insurance coverage for this, so any damage that is upheld would have to come out of the regular financing devices that that institute has and for many school districts, particularly our rural districts, that would be impossible; it would in effect shut down the school districts. He stated that they certainly feel that providing education in Montana is a compelling state interest.

BILL VERWOLF, representing the city of Helena, said that they support this bill.

There were no further proponents.

ERIK THUESON, an attorney with Hoyt and Trieweiler in Great Falls, stated that he was the attorney who represented Karla White before the Montana Supreme Court; he would like to talk to the committee about what the Montana Supreme Court really did say in the Karla White decision, because he thinks that what they said defines the power that this legislature has to pass additional legislation dealing with governmental immunity; he will leave the other policy references to other opponents of the bill.

He indicated that there were four separate areas that he would like to talk to them about; (1) he would like to talk about the bill's claim that there is a compelling state interest here served by the present legislation and he would like to match that against what the Montana Supreme Court stated; (2) he would like to talk about the language in the Montana Supreme Court case and the language says that they are dealing here with a fundamental constitutional right - exactly what did the court mean, what effect does that have on this body's right to act on past judicial legislation; and he stated he would discuss some of the limitations of their powers to clear that; and fourthly, he would just like to make some suggestions in light of the Montana Supreme Court decision as to what he thinks should be done by this committee and what he feels should be recommended by this committee.

He advised the committee that, first of all, there has been some claims and it is, of course, stated in the bill that we the legislature must find a compelling state interest; he would like to say to this body that all the language in the bill right now was also in the state's brief in the Karla White case, was also argued by Mr. Young to the Montana Supreme Court during oral argument; was also addressed by the Montana Supreme Court in their decision itself. He indicated that he would like to read to them what the Montana Supreme Court stated about the

compelling state interest that Mr. Young has indicated supports this bill. He quoted from page 6 of the decision, after reviewing what the state had to say in the White case and all the things that are in the present legislation, "Furthermore, at this point, the state has failed to demonstrate a compelling state interest which would justify any limitation." He repeated this; then commented that if the state has now drafted a bill putting in the same arguments that were made to the Montana Supreme Court and put in there expressed language doesn't make those reasons any more compelling now; and as Mr. Towe has told you the Montana Supreme Court is the law of the land. He stated that he is not saying that you can't put limits on for recovery, but he would like to discuss with them some of the limitations that they have to consider.

Secondly, he said that he would like to talk about fundamental constitutional rights, because that is what the Montana Supreme Court said was that a person's right to recover when they are injured, be it by the state's wrongdoing or a private party's wrongdoing, is a fundamental constitutional right. He contended that this has special significance and it has special significance to them as legislators and he went on to tell them about some fundamental constitutional rights. He continued that one fundamental constitutional right they all have is the right not to be discriminated against because of the color of their skin; another constitutional right is the right to not be discriminated against because of our race or because of our religious beliefs - those are fundamental constitutional rights - and the right to be compensated when you are injured by any person in this state is also a fundamental constitutional right; they are on the same par; and that signals something to the legislature about your power to act; it doesn't say you can't act; but signals that there are certain requirements to meet before you do act; and he would like to talk about those requirements. He asserted that there are basically three that he can see - the first one is that before you suggest legislation or pass legislation that infringes upon this right, you have to know from the facts put before you that it is absolutely necessary; not just a compelling state interest, but that it is necessary, absolutely necessary; or the wheels of government will grind to a halt if you don't have this limitation on government

liability; and that is requirement #1. He indicated that the second requirement is that legislation has to be tailored to meet the matter that you are trying to discourage; for instance, if there is a problem of local government entities needing tort liability, then that is where your legislation should go; that is where you should aim your legislation; you should say that these local government entities are going to have some problems meeting their obligations unless they have certain limitations; but you can't be overly broad because of the nature of this right; you can't say that also the state should have limitations; and you can't just have a blanket $300,000.00. He continued that Mr. Towe has indicated to you and Mr. Young had indicated to the Montana Supreme Court in his oral argument that he didn't see any problem with the state meeting its tort liabilities, but he had some concern that the local government entities would have some difficulties; so there is no reason here, first of all, to give the state any liability limits whatsoever.

He testified that the third thing they have to consider when they are passing legislation on such a sensitive area is that you have to balance what you are accomplishing against the rights that you are taking away; now here there is no problem with people that have suffered injuries under $300,000.00 and that is going to be about 90 per cent of the people that are injured by the state; (he felt that was pretty fair to say) you are talking about maybe 10 per cent that might have injuries above $300,000.00; but who are these people; they are a minority, that is true; but that is why they have constitutional rights to protect minorities; they are the worst injured; they are the quadraplegics - people who have lost limbs - they are the people who have been disfigured; these are the people that are going to have those high damages; so in considering this legislation, which doesn't grant to these people any compensation because their medical bills are going to be in the neighborhood of $300,000.00, you might consider the losses of those people and you might

ask yourself do we really have to do that to these people to justify a compelling state interest; are we really going to gain that much. He continued that along those lines, he has noticed that all the proponents told you how difficult it was for them to get liability coverage, but he is wondering here whether or not there would not be an umbrella policy available to state entities and local government entities; he wondered about the cost of that umbrella policy to cover that unique case - that minority case - where the damages do exceed $300,000.00; how much would it cost the government on an annual basis to have an umbrella policy; we don't know; that is one of the problems with this legislation; we don't know; perhaps it would only cost $500,000.00 a year to cover both local and state government for damages in excess of $300,000.00; if you take the local governments and you take the state governments (he is not an expert in this, but he would imagine that the total budgets exceed $1 billion) and if, in fact, the umbrella policy is only $500,000.00 to cover those unfortunate people that have been injured badly, then you are talking about something - what? .2 percentage points of the entire budget of all government entities to protect these people; and he wondered if it is necessary not to buy an umbrella policy in order to pass legislation to give the government some immunity. He asked the committee to consider that.

He indicated that there was a thing that bothered him about this legislation and that is that they are dealing with a sensitive area; if the committee was considering a bill right now that discriminated against a person because of his sex, or because of his race, he would bet that not one of you would consider passing that legislation the way that this legislation is going through the Senate and the House; you would want to know the facts not only from the proponents of the bill, but from the opponents of the bill; why do they have to discriminate against people because of their sex or race; you would want to give notice to all the people when you have something that is not very accurate here when you consider that this originated in the Senate less than a week ago; and there really has not been time for anyone to come before the committee to talk to the representatives and to say, "Hey, this is our opinion of this

sensitive and very important legislation"; and he guessed what bothered him this is a very sensitive area and it is going through awfully fast; this brings him to his fourth point.

He continued that this was his suggestion to take your time with this; you don't have any facts to work with right now; all you have are the assertions of the proponents of this bill as to why it is necessary; you have to take time; you have to get the facts before you pass legislation; you have to tilt your legislation, if necessary to those areas of government where it is impossible to get insurance or where their functions will be lost if you don't have some liability limits; but this bill doesn't accomplish that. He advised that they take their time and he suggested perhaps some interim committee to study the problem; now the state doesn't have liability limits right now and the problems are going to become readily apparent in the next two years; you are going to see if there are certain government activities that require limits and you are going to see areas that don't require limits; and you are going to know what will be the proper amounts - you are not going to have to pull something out of the hat like $300,000.00 - you are going to know just what the limits have to be. He asked them to take their time; maybe get a committee, study this problem, see what happens now that there is unlimited liability; and then, after that, maybe the next session, address that problem; if necessary, come up with some legislative plan that really addresses this problem. He said that was all he had to say and would be happy to answer any questions.

MIKE MELOY, practicing attorney in Helena, his practice is primarily in trying cases, a member of the board of the Montana Trial Lawyers Association, said that he also teaches constitutional law at Carrol College and has done so since 1973. He advised that he would like to say two things about this bill, because he thinks the committee would make a mistake in passing it; (1) to amplify just slightly the comments of his colleague who just spoke, the Montana Supreme Court has told us that

the right to a pain remedy for us as an injured party is a fundamental right; that is very significant to the annals of constitutional law, because there must be applied the most strict test before a state can interfere with that right; and he knew only one case in which the U. S. Supreme Court has ruled that an interference with that fundamental right is permissable and that was in the Korematsu case during World War II, when people of Japanese extraction were getting interned as a result of a fear that they might be harming national policy; there was a fear in the nation there based upon race; and the Supreme Court justified that only because of the circumstances that prevailed at that particular time. He emphasized that he knows of no other case where any state or federal government has yet to pass strict scrutiny; so if you are wrong by passing this bill; if the Supreme Court has said that there must be a compelling state interest, and if you don't have one, what is going to happen in the interim is that this bill is also going to be striken; and you either have to come back in special session; or you are going to have a period there where you have absolutely no insurance to cover a claim which some court or jury might award. He stated that it would seem to him rather than to put the eggs in the basket that is represented in this bill, that it would be better to start thinking about the kinds of insurance policies that state and local government would have to get in order to cover for those very rare claims and awards that are made in excess of the funds that are now available to cover most claims; it seems to him that that would be the better way of approach than try to rely on a bill which, in his opinion, will not meet and is very little different than the facts that were presented to the Supreme Court in arguing the Karla White case. He continued, notwithstanding the numbers that Mr. Young has given you and that Mr. Towe wishes to have amended into the bill, it would seem to him that the record you would be looking at to support the notion that governments are going to be bankrupt if you don't have a limitation like

this are not the total number of claims or the total amount of claims, but the actual claims experienced; how much has actually been paid out in six years, since 1977; because that's the significant financial burden that the state and local governmental entity will assume should they not have these limits. He contended that that is the financial information that the Supreme Court is looking for in deciding whether there is a compelling state interest in imposing limitations; what are those numbers; it isn't going to do any good to ask a person who just came home from fishing how many fish he left in the river - the question is how many fish did he bring home.

He stated that he asked Mr. Young if he could tell him how many claims in excess of $200,000.00 have been paid since July 1, 1977; he tells him there are five; two of the claims arose out of the F-106 crash in Dillon; and the state paid the lady who was burned severly $200,000.00; and they paid the Dillon Elevator Company $249,000.00; those are two of the claims that are in excess of $200,000.00. He testified that the other one involved a case in Great Falls wherein a lady was injured which resulted in an embolism, which caused damage to her brain and caused her I.Q. to go down substantially; and the state settled that case for $250,000.00. He noted that the other case was the Jacques case; that is the National Guard case, in which the jurors and the Supreme Court affirmed a very tough $1 million - a little over $1 million. He indicated that in seven years, those are the substantial claims that have been settled or actually paid; he couldn't believe that you couldn't get insurance to cover those few instances where the claims are very large and subtract those numbers from the amount that was paid out; and divide that by the number of those cases, you come up with an average claim of about $2,300.00; those are the kind of claims that Mr. Young has paid; and it seems to him that those numbers are not substantial enough to make a compelling interest argument; and it seems to him that because

of that that this committee, the legislature and the Department of Administration ought to be looking for an alternative rather than imposing a bill, which he thinks is not constitutional and will leave the state without any insurance to cover claims should that happen.

PAUL SMITH, a practicing attorney in Boulder, Montana, stated that the main reason he chose to come in today is that although he is not a great trial lawyer, that he has in the past represented on one occasion a para-palegic; and he felt that that type of thing has to be addressed somewhat today. He testified that the thing that impressed him, and he has dealt with Mr. Young on some things before - he is a good attorney and protects the state's interest well - was when he was describing the difference between the corporate world and doing business out there in the state; he stated that the government is here mainly to protect society; and he agrees and he wants them to think about that; he contended that they have heard about these cases and they have read about them; and the corporate world and the automakers say, "Do we put this safety factor in and if we don't we put in how we are going to be sued or whatever, and if it is going to cost us less not to put it in, we are not going to put it in," so what about the injuries. He indicated that they are sitting here as a legislative body taking a look at this and the people out there with catastrophic injuries, they have a right to be heard too; and they have a right to be protected; what would happen if the example that Mr. Towe talked about if 150 people on a plane were not all killed - they were injured and maimed - there were people in there that had families; you are talking about, under the limits that are put there, about $6,600.00 per family; that has to be picked up somewhere - their own insurance policies, what they have lost in wages - that is going to come out of government somehow; it is going to come out of the local government; whether those families might be on welfare or food stamps or Medicaid or whatever; the cost to society has to be picked up somewhere. He asserted that it was more proper to do it under an insurance policy, under some sort of an

umbrella coverage; we are not talking about a situation where the government is going to be broke; we are talking about the few instances that might be over $300,000.00. He contended that he did not see any figures as to what it is going to cost the state to buy that umbrella coverage above what they think they can afford on their own funding. He urged the committee to take a strong look at what the cost of protecting people in society is going to cost the state or the local governments as far as umbrella insurance coverage is concerned; he felt that the few instances that might be over $300,000.00 might be well served if they would look into purchasing that umbrella coverage.

JIM MOORE, a practicing attorney in Kalispell and the president of the Montana Trial Lawyers' Association, pointed out that he had no claims against the state or any other governmental entity at this time in excess of $300,000.00 or $1 million so he does not stand to benefit directly from any action by the committee here today. He stated that as trial lawyers they would be protecting themselves by testifying here today, but any of the members on this committee are a potential victim; they do represent these victims; they see these people in the context of their practice more frequently than the average person does; victims don't have an association or an organization; they don't have any group that would come before this committee to talk about the adequacy or the inadequacy of the system to take care of their needs.

He testified that he did not think that the act speaks to the real problems that Mr. Young has and the Department of Administration has; their experience and frustrations is the weight of litigation; and he thought that Mr. Young would concede that the weight of litigation is not ? in that $300.000.00 limit; in fact, 500 some cases are not going to be affected at all, because those 500 some cases would fall within the $300,000.00 limit or whatever limits this legislative committee proposes; and those cases will still bear an expensive investigative process.

He thought that in light of the Supreme Court case implied they were to look at the compelling state interest and, if there were a compelling state interest since 1977, which the Supreme Court says there was not, for the very reasons that it has now been placed in the bill establishing a compelling state interest today, it would have been much longer in 1977 than today, because to stand before this committee today and ask you to pass this bill without any information in the six-year span, you have been given some figures by the Department of Administration; (he had not seen those figures - he was given some others by Mr. Young; he would like to commend Mr. Young and the Department of Administration for providing them with this information, he was over there bothering them this morning and yesterday afternoon in an effort to find some information, and he appreciates the consideration that he was treated with over there, and the information was given to him; he did not know what is on this sheet yet,) but he would point out that he obtained no information of significance as to what is available today. He continued that he has listened to witnesses that got up as proponents of this bill, who said that there was not insurance coverage; frankly, he did not believe that; he thinks that there is probably excess coverage available and umbrella coverage available; if they had come out with facts and figures and said that this type of insurance is going to cost us some amount, that would be one thing; but they haven't come up with any figures; and he would submit that this thing has just simply not been looked at seriously. He indicated that so far as the availability of coverage or the availability of realistic alternatives to limitations in arbitrary situations is presented as theories; so he thinks the bill is most objectionable insofar as it is not based upon current information; and it is objectionable, as it has been pointed out, because it is based on claims as opposed to actual experience; like Meloy mentioned that given all the assertions that the Supreme Court indicated were not satisfactory to establish a compelling state interest

in the White case; in fact, just a list of those have now been placed in this bill; so he thinks that this bill is extremely suspect insofar as the constitutionality is going to have to even if the state passes this bill out with these limitations, they would be well advised to go out and shop for an umbrella policy or for an excess coverage policy because if it is bolted down, there is going to have to be some way to pick up the bill reasonably and that is the most predictable means of doing that is through insurance. He pointed out, from his experience in handling these types of claims, previously a practical consideration is that being that juries are made up of twelve of your constituents, who are not, in fact, free with the money of the state; he found it extremely difficult to argue to those juries; in every case he found that they were very tight-fisted with the state's money; and, frankly, he guessed he believed that in his experience the only way he could obtain a judgment that would be in excess of $300,000.00 or in excess of $1 million is if he had a case that involved some real God-awful injuries; and that is what he thinks is the critical thing you have to look at in this bill. He contended that everybody is projecting this bill from the state's standpoint and obviously it is the state's line to place arbitrary limitations on the person's ability to be compensated for injuries that are imposed on that person; but nobody is looking at this from the victim's standpoint; and in the 150-person airline accident that $6,600.00 is not going to raise children or take care of a surviving spouse; what it is is that it is a second victimization of the victim. He continued that it seems to him that this bill would be a condemnation that says that Montana recognizes condemnation and the right of the landowner to be justly compensated for land taken, but they are going to put $100,000.00 limit on that, so that that process will take place without any regard to quantity of land taken or to the quality of land taken, whether it is lakefront or desert, abandoned railroad property, whatever it is, they would

just put on an arbitrary $100,000.00 limit. He indicated that this is what this bill does, except it goes a step worse and a step farther because it does it to a human being; and it says you owe him $300,000.00 and they are not going to recognize the damage or the loss; and to that extent, the state would be a party to making a victim out of the victim. He stated that he would very much appreciate your consideration in not passing this and looking into the fact of acquiring insurance and taking two years or four years experience and looking at the realities of the case and then looking at it from an agency by agency or department by department basis.

KARLA GRAY, representing the Montana Trial Lawyers' Association, said that she rose in opposition to this one last bill; she would like to make two comments with regard to some of the information that Senator Towe presented to them in regard to limits in the sister states and that sort of thing. She pointed out to the committee that there are other states - sister states here in the west - that have no limits, they being California, Washington and Arizona, and there may well be others. She also strenuously questioned whether these other sister states that have limits have the same state constitutional provison that we have here in Montana in Article II, Section 16, which requires constitutionally a remedy for every injured. She concluded asking the committee to do not pass this bill.

There were no further opponents.

SENATOR TOWE said that he would like to address some of the things that were stated; first of all, he must admit that he tends to be more inclined toward the same kinds of things that the trial lawyers spoke to and are concerned about; in fact, he was the one who did more speaking against all those soverign immunity bills than anyone else because it doesn't seem fair that they will limit people's recovery against the state; but when they got into that study, they did uncover some facts that

did change his mind; and let him give them a couple of those facts right now. He explained that much was made of the fact "Well, why don't you go out and get excess coverage?" or "Why don't you go out and buy insurance?"; well, before this bill was passed in 1977, the state of Montana let out two bids for just exactly that - no takers - nobody - with one exception, he thought it was the second time, Hartford Insurance came in and said for $1 million, they would give them $1 million worth of coverage. He commented a lot of good that does; they decided let us keep it and pay off that coverage ourselves; in other words, what he is saying is is that the activities of the state are so broad when you include all the National Guard activities, when you include all the Highway Patrol activities; when you include the police activities, the prison activities, taking care of the mental patients in Warm Springs; when you take all the state lands and all the activities in state government; now add to that all the same kinds of problems that the city governments and county governments have - nobody wants it; and they are not going to insure and that is why it is not like a business where your activities are at least limited to the business activities of that corporation; and that is why the state just can't get coverage. He continued as Judge Gulbrandson said in his concurring opinion, and he invites them to read that, that the activities of the state are so broad and yet we must do them; we can't say, "Well, I am sorry we can't get insurance coverage, we can't chase the criminals anymore, so we are not going to do it." He contended that the state has to do it anyway and that is what they are talking about.

He indicated that a couple of other comments he wanted to make is that there are a lot of cases still pending that are in excess of the $300,000.00 limitation; the 144 cases that you see that are still pending, those are the big ones; the little ones have gotten settled, but the big ones haven't; even in those cases where there has been a settlement, generally there has been a settlement because there was co-insurance, or somebody

else was liable; and the state says, "Well, we will pay this much economic damages and you can take care of the others." and they have been able to put a settlement together on that basis. He noted that there are some times when there is no offset; in fact, there generally is no offset at all; the elevator in Dillon got paid for three times; he didn't blame them; the guy that owns the elevator - he would do it too; but the federal government paid him; the state paid him and a private insurance company paid him; he paid his insurance; he was entitled to it; and he doesn't begrudge that; but the point is there is a reason and a need for the limit; and that is the significant thing.

The other thing he wanted to point out, he indicated, was that when Eric Thueson read that provision from the court case, he didn't read the first two sentences; and he followed up only with the conclusion. (?) The first two sentences, he stated, make it very clear that they are talking about the constitutionality of $300,000.00 and $1 million damages; and if there is any doubt about it read Judge Gulbrandson's concurring opinion, which says just exactly that; and consequently he thinks it would stand up. He continued that as Mike Meloy says (he stated he had great respect for Mike and he thinks he is absolutely right) that if we don't do the right thing, they will be into a special session or they will be without insurance. He suggested that if they don't pass this bill, that is exactly where they are going to be - without insurance and he does not know how long it would be before the governor calls a special session so they can come back and do it, because he just doesn't think they can afford to be exposed.

He advised the committee that there was one more thing that needed to be mentioned in addition to the fact that they are the most generous state in the nation - and he felt that was great, he is happy with that, he is glad they are generous - but North Dakota doesn't allow any or some of these other states allow $50,000.00 total - that is a pretty severe limitation compared to

our $300,000/$1 million; but don't stop there; the constitution of the state of Montana adopted by the people of the state of Montana very recently in Article II, Section 18, says the state subject to suit - states, cities, towns and all other local governmental entities shall have no immunity from suit for injury to a person or property except as may be specifically provided by law - by a two-thirds vote of each house of the legislature. He emphasized that unless they toss that out because the people did not know what they were talking about when they voted that in, we have authority to do what they are talking about here right now - that is why he thinks it should be up to the legislature.

REPRESENTATIVE BERGENE asked if Senator Towe could be more specific on page 6, line 6 where it says"$300,000 for each claimant and $1 million for each occurrence" and she wondered just exactly what does that mean. SENATOR TOWE responded that let's assume that there is an automobile accident involving a highway patrol car because of the negligence of the highway patrolman and there were five people injured; no one person can receive more than $300,000.00 for those injuries and the total of all five together could not receive more than $1 million.

REPRESENTATIVE ADDY asked Mr. Young how many cases do they have where the prayer is for more than $300,000.00. MR. YOUNG replied that he did not have that exact information with him, but they have many, many prayers - he would say that most prayers that are on the books are in excess of the $300,000.00 limit per person.

REPRESENTATIVE ADDY said that that fact would be suggested by the large number of amicus briefs in White vs. Montana. MR. YOUNG answered that that may be, but it probably suggested that most local governments are trying to look out for their taxpayers.

REPRESENTATIVE ADDY asked if he knew how many prayers they have for more than $1 million. MR. YOUNG answered that out of the roughly 240 some claims that have prayers

you are looking at $83 million, almost $84 million; there are a substantial number; he does not have the claims register with him, but they would be here all day looking at that sort of thing. He indicated that they have a number of prayers in the $3 million to $4 million range; they have a couple prayers in the $8 million range; they have a number of prayers between a half million and $8 million. He stated that he could not give him any specific number.

REPRESENTATIVE ADDY commented that it seems that they have to make a political decision in a legal context or vice versa; and the concern that he is hearing from the opponents is that if we reenact the $300,000.00 limit, that that limit is going to be challenged right away and they will be right back in the same place they are at right now. He wondered if they increased it to $500,000.00 or three-fourths of a million or a million per person, where do they begin to make the risk of their new statute to be declared unconstitutional a very slim one. MR. YOUNG responded that that is a possibility; what he would like to point out is what everyone is talking about here is that the Supreme Court did indicate, in a back-handed sort of manner, and particularly in the nonconcurring and dissenting opinions that the $300,000/$1 million was O.K.; the majority opinion specifically struck it out because they could not reconcile the economic/noneconomic thing and Justice Morrison virtually invited us to bring it back in. He stated that there are some things that you should be aware of - when the case was tried in Great Falls in a hearing in the fall of 1981, the state was not in any kind of a budget crunch that it is in today, which you can find by just reading the newspapers; he pointed out that they paid more money in claims and cases that have matured since January than they have paid in the last six years, so the trend is definitely growing; anytime you have a book of business and claims, it takes four to six years for any of your clients to hit your desk, get through the district court systems on into the supreme court and down, so he would submit that the 144 claims are considerably more valuable than what has been paid out today; in fact, his own figures would indicate

that they are exactly twice as valuable with the old limits, including no liability for pain and suffering or mental distress or emotional affliction. He advised that the state has set aside resources to pay this and the balance has gone from $9 million to $7 1/2 million in the last two months, so if you double our existing reserves for the 144 cases not including what is coming down every day, you are over the amount of resources that the state has set aside and you are now taking money out of the general fund and robbing the programs and that is a decision that they have to make. He thinks the bill is arguably constitutional; he thinks they will be right back in it in the Karla White case and he thinks they will be right back in it in a number of cases. He added some district judges uphold this law and a number of states have upheld it - similar; it is not simply a matter of insurance as has been suggested.

SENATOR TURNAGE said that he thought they should bear in mind that these figures $300,000/$1 million are not new; that is the law that was on the books in 1977; regardless of what figures you put in there - $5 million or $10 million - it is going to be challenged anyway; the court didn't strike the bill down because of the $300,000/$1 million; they would have struck it down if there had been any limit there; they based it on our segregating economic and noneconomic damages from the recovery category; that is what they were doing; and as he pointed out they invited us to bring this back.

He continued that as to insurance coverage, you have to keep in mind that local government are not self-insurers; and local government either has to go bare or buy it; if you raise the limits, it is going to raise the premiums.

MR. THUESON indicated that the proponents of this bill used the same grounds they used before the Montana Supreme Court to justify the current legislation and if the court didn't find a compelling state interest the first time around, they are not going to find a compelling state interest the second time. He stated that

there are two other things you should know about this bill: (1) there is an attempt to make it work retroactively and that is clearly unconstitutional; it can't affect substantive rights retroactively; otherwise, there is another thing you should know about this bill; Senator Towe mentioned that Judge Gulbrandson mentioned something about the government having certain governmental activities - that was the dissenting portion of Judge Gulbrandson's opinion; at least that was not where he was concurring; he was in a dissent there; he was in a minority - that is not the law of Montana; the majority opinion of the four justices is the law of Montana. He stated that it would be clearly unconstitutional because they are using the same grounds to try and justify this legislation as past legislation.

REPRESENTATIVE ADDY asked if anybody has any figures on what the difference would be on a premium for $300,000/$1 million versus $1 million/$3 million. MR. HANSON responded that he talked with the city of Missoula and they told him that they talked to their insurance carrier; currently they are paying $47,000.00; according to what they told him if the limits were increased to $3 million per occurrence and $1 million per claimant, their premium would go to $75,000.00.

REPRESENTATIVE ADDY commented $28,000.00 increase.

REPRESENTATIVE SPAETH said that he would like to ask Mike Young a couple of questions; we were talking about 44 per cent having a specific amount of damages; isn't it true that in the 56 per cent they are just asking for damages and those damages could be considerable as you get closer and closer to trial and probably will be. He stated that it has been his experience that that unspecified damages in the prayer by the time the trial gets closer becomes larger and larger and larger as opposed to being decreased and he asked if this was not the case. MR. YOUNG replied that the 315 cases for which there is no prayer are, of course, bodily injury claims that were filed since 1979 or 1981, when the legislature passed a law saying that claimants could

no longer file these enormous claims for damages with their case, so what you substitute this with is a request for statement of claim after the pleadings are filed and then you get a request in; and in his experience, the request for statement of claims again has 3 to 5 to $10 million and everything that you can possibly throw in the form book on top of it; and it is kind of a meaningless exercize.

CHAIRMAN BROWN asked what the committee's desire is as they are to meet on the floor in two minutes; do they want to be excused and finish or come back depending on what is going on on the floor.

REPRESENTATIVE RAMIREZ indicated that they have caucuses as soon as they go back in, so he thought that they probably ought to go back in.

CHAIRMAN BROWN indicated if that is the case then why don't they stay and if no one opposes, why don't they wait until they know that those caucuses are going on.

The committee agreed.

REPRESENTATIVE HANNAH asked if they were going to do that, was he going to ask all of these people to come back to answer questions at that time. CHAIRMAN BROWN replied that he would like to get the questions and answers over before they break and then go into executive action.

REPRESENTATIVE SPAETH said that he would cut his questions down to just one more question and he would like to direct this to Senator Towe; Representative Addy talked about our committee making a political decision (he thought they were talking about the legislature and since he is a part of that legislature) he does not view this necessarily as a political decision we are making here but we are essentially making a decision that may impact the overall activities of state government and how we function as a legislature; and he requested that he expand on that as political versus functions of

government. SENATOR TOWE replied that he would go back to the provision in the constitution that does say that sovereign immunity can be imposed on a two-thirds vote; and obviously, the people that drafted and got that passed and the people that voted for it contemplated that there would be those situations to allow unlimited liability to state and local government would be just more than they could afford. He thought that there is a real risk that they would grind some government activities to a standstill; how can a community or the organized city of Bear Creek possibly afford ? or Roberts or all of those other towns; how can they afford to have a police department; wouldn't it be much easier if they just simply said, "Hey, if we are going to have to pay $50,000.00 or $100,000.00 a year to get this kind of coverage, let's just not do it; we'll just abolish the police department." and he did not think that is what the citizens have a right to deserve, to ask of us. He felt that we have a responsibility of making the dividing line; he thought they did that in their committee; he was sensitive to that; and he thought the other committee members were sensitive to that; we don't want to just carve out areas and say, "Nothing that the National Guard does can prove any liability" because they can be just as liable and cause just as much harm and damages as anybody else; but, if they put an upper limit on the amount, they can allow everybody to recover, but they can put in some reasonableness on this, the situations of communities and cities .

REPRESENTATIVE RAMIREZ stated that he wanted to ask Mr. Meloy a question on compelling state interest from the constitutional law standpoint, (he doesn't remember the answer to this) and he asked if there was a different standard when the attorney for the state argues a compelling state interest as opposed to when the legislature makes a specific finding as it is going to do in this bill that there is a compelling state interest; in other words, will this carry more weight with the court after a legislative determination as opposed to

just an argument made in the appellate case without any factuary basis. MR. MELOY replied as he understands it the way in which a constitutional argument is made, the lawyer who would be intending to establish a compelling state interest would have to make a factual record upon which the court could make a determination that a compelling state interest did in fact exist; so what the legislature may put in its legislation is helpful only to the extent that it might conform legislative intent to the factual record as established at trial when a compelling state interest facts were put forward by the state; so irregardless of what they put in the bill with respect to why you think this is a good idea, there will still have to be record made in order to support the notion that governments are going to go broke. He thought that is where the test falls.

REPRESENTATIVE RAMIREZ indicated that he wanted to ask a general question, because it seems to him that they have a problem here in that a real compelling state interest is that they do not have any protection right at the moment; and they really do not have any facts upon which to base this decision; he really agrees with Erik that they don't have the facts upon which to base a decision, but they have to do something in the meantime until they can gather the information, if what Mr. Meloy says is accurate - the court isn't going to take our legislative determination of a compelling state interest at its face value and they are still going to look at the underlying facts and they really don't gain much by just saying that we have a compelling state interest; we still have to prove it. He commented that they did not have any kind of evidence here today to speak of, at least in his mind. He suggested and would like their reaction is that he thinks they have to pass something here, but he also thinks they should have some kind of a study - an interim study as suggested to look into this to see if they can tailor this a little bit more to what some of the problems are; he does think

there is a difference between local government and the state; he does think there is a difference in some of these activities, such as the National Guard on maneuvers versus the ordinary operations of the Motor Pool, or something like that, driving automobiles; maybe they should look into it a little more carefully if they are going to be able to hold it before the court; so he would throw that out.

MR. YOUNG responded that they had this same problem going into the hearing; his partner came into him and said, "What am I going to put on there about this compelling state interest question?" and what you have to remember is that most of the law in that area - the other cases out of other states under their constitution - say it is not a compelling state interest problem; that you use a different constitutional standard; that it is not equal protection; it is not due process; you go to ??indigenous article; that was basically the thrust of our case, because when we were looking at that issue, the state had a $50 to $100 million surplus; the Board of Investments was making money hand over fist and they seemed to have a large surplus in our own fund; and they couldn't see that they could do anybody any good by putting that type of evidence into the record. He continued that now he thinks they have an entirely different financial picture for the state and all the local governments today than they had in August or September of 1981; and he guesses it gets down to a fundamental question of, "Is the Supreme Court going to say you have to be bankrupt before you have a compelling interest, is there not some probability?". He felt that from some things that they have seen come into this session with Finance and Claims Committee evidence and House Appropriations and the fight over the pay plan and the fight over the executive budget, $26 million deficits and the financial information that is to be incurred between now and 1985 is an entirely different picture than the state's financial picture was in the last biennium; and that

is what they had to work with at the time and, of course, they were basically arguing their case that it wasn't even a protection issue; so you have before you now the deliberation of all of the finance bills, 447, the building programs and all of your agency budgets; and he thought that they can argue for you that you now have that information; we can put the House Bill 447; we can put the records of the Finance and Claims Committee, House Appropriations, your deliberations on the floor as to state finances and all the debates about surpluses, and if he has to listen all day to Judy Rippingale and report in a three-day hearing that they are going broke, he guessed that is what they will do. He thought that is what they are suggesting; and the Supreme Court did sort of suggest that; but what you are doing with this finding is lending some sort of credence that you understand what you are doing; and he thinks that is one of the common problems you have with the Supreme Court is they have this general notion that bills get passed and legislators don't have any idea what they are doing. He said that to answer Representative Ramirez's question, he did not know if they have to take your findings at face value, but they can take your findings together with what we can put on a demonstrable record and it was difficult to defend that economic/noneconomic business - extremely difficult to defend - he had a devil of a time with it and a number of cases where they had badly burned people who were not working and they really didn't like it either, so he thought they could all live with this; but that is basically where we are; and he hopes that answers their questions.

REPRESENTATIVE RAMIREZ said he had a quick follow-up and he was looking for a quick follow-up answer; the question he has is this; if we pass something (say, this bill, because they have to be protected) do you have enough confidence in your position that you feel that we should ignore this problem for two years until this bill is challenged, or should they go ahead and have an interim study, or look into something, (maybe, an interim study isn't the way to do it) and look into it; and the second part of that is, if we do it that way, will the very fact

that we are looking into it hurt your arguments in trying to . MR. YOUNG replied that his guess would be that they already had one exhaustive interim study and most of the data from that is still fairly valid; their thought is if they felt there was some message being sent to them when the Supreme Court came down with their opinion in the waning days of the session, they took that as meaning they should get something in right now as they could have very easily held this until you went home and then you would probably have wanted to have an interim study. He thought that they would have to make an attempt to treat this as a curative bill and retroactively apply it; and he fully understands the problems with that; they have looked into it; they don't think it is ex post facto; they don't think it impairs obligations of contracts; but they certainly recognize that there is a fight over that on vested rights; and he guessed they have to decide a number of legal questions there on what is a vested right, when it accrues, when it is effective; and the Supreme Court can't, and they have asked them on a petition for rehearing, to apply their ruling prospectively to give you a chance to act; they have also asked them not to apply the rule retroactively, so that it doesn't go back and impair all of these claims. He continued that they had a particular hearing filed Monday morning - yesterday - or whenever - and they haven't heard anything on it; so they are attempting by that means to allow you to do what they are trying to do here.

SENATOR TURNAGE commented that he gets very nervous when you talk about studies; that is obviously going to be an admission against interest; and you are inviting the court to say, "Well, obviously the , hasn't been able to identify; he did not think that would be wise; if you do a study, you better study it specifically on the question $300,000.00 or $1 million, not that there should be a cap, although he agrees on that, but
He contended that the Supreme Court divided on this four to three; and our existing statute is as naked as a jaybird as to a compelling state interest; this

one isn't; even though it may be self-serving, it is still in the statute.

REPRESENTATIVE RAMIREZ asked what is the reserve in the self-insurance fund right now. MR. YOUNG replied that it is about $7.7 million.

REPRESENTATIVE RAMIREZ asked if they were undertaking that study to determine whether they are actuarily sound - do you have adequate reserves. MR. YOUNG responded that they have had two of them and both of them felt that the reserves were adequate, but they both said to throw the studies out the window if they lose this case.

REPRESENTATIVE RAMIREZ said that is what he meant - how long would it take you to find that out in respect to the new proposed bill. MR. YOUNG replied that it is going to require every attorney to evaluate and identify the economic aspects of these 144 cases; we get them in and he does his own and take it off the actuaries and start all over again - it is a whole new ball game.

REPRESENTATIVE RAMIREZ assumed that they had already undertaken that. MR. YOUNG answered that they wanted to wait until their petition for a rehearing was acted on, before they start incurring costs for actuaries.

REPRESENTATIVE HANNAH asked Mr. Young if he said that the decision of the court was substantially influenced by the economic conditions of the state. MR. YOUNG replied that they basically couldn't show that the state was going to grind to a halt financially in the absence of the showing; there was one comment out of context with the rest of the opinion; but that was not

REPRESENTATIVE HANNAH questioned if he thought they were saying a compelling interest then is based upon the economic strength of the state. MR. YOUNG responded that that could be one item; ability to pay is certainly what they are getting at.

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

EXECUTIVE SESSION

SENATE BILL 465

CHAIRMAN BROWN declared that they have time to take care of this bill.

REPRESENTATIVE SPAETH moved that the bill BE CONCURRED IN. The motion was seconded by REPRESENTATIVE HANNAH.

REPRESENTATIVE ADDY moved to amend the bill on page 6, line 6, where there are limits by striking $300,000 and inserting $1 million and strike $1 and insert $3 so it would be $1 million for each claimant and $3 million for each occurrence. He asserted that he agreed wholeheartedly with Senator Turnage that if they don't pass something here, state and local government are going to be looking at a very difficult proposition for the next couple years; and he also notes that they are imposing sovereigh immunity as our present limits have been declared unconstitutional; so, therefore, it is going to take a two-thirds vote of each house to even get a bill through that is colorably constitutional. He commented that, otherwise, they just haven't done anything; the third thing is that if you are looking at $300,000.00 that is the same limit they had before and they will have the same pressure on that limit from a litigation point of view that they have had before; if they triple those limits, he thought they would divide the pressure of litigation by three, if not geometrically by nine. REPRESENTATIVE JENSEN seconded the motion.

REPRESENTATIVE RAMIREZ said that he wanted to tell them exactly where he is because he does happen to have a case against the state, but unfortunately he doesn't think it is worth $300,000.00, but he is a little sensitive about some of these things. He indicated that

if they were talking about a lower limit, he would probably abstain; he is going to vote against this increase, because he thinks it is too high (he is not saying that it is too high from a philosophical standpoint or anything like that) he was just saying they have $7 million in their reserve; they don't have the vaguest idea of what the actuary basis is for the changes that were made; they are really in the dark; it seems to him that the real compelling state interest in all of this is that they are entitled to act on an emergency, which he considers an almost emergency basis, right now, simply because they don't have the time to get together the data to really determine just how this problem should be approached. He felt that it would be disastrous for them to raise the limits to that height; he just did not know that they had any idea of what the consequences would be; so he would have to resist that. He commented that some more modest raise might be appropriate.

REPRESENTATIVE EUDAILY advised that he was going to resist the motion too, because he thinks that they should put it through just as it is in the bill without amending it and take their chances from that point; if they start amending, it will delay the process a little bit; and from what he heard today, he is not sure that the $300,000/$1 million was the critical area that was determined by the court decision; and he thinks they should just leave it the way it is.

REPRESENTATIVE ADDY indicated that the emergency situation is exactly why you want to alleviate the pressure of litigation as much as possible; the argument that Representative Ramirez and Representative Eudaily are making against the amendment are exactly the arguments that are going to be made against the bill in court when it comes up; and he thinks that they aren't dealing with what they would like to do opposed to what they wouldn't like to do; they are dealing with minimizing the risk or reducing the risk as much as possible to local government. He continued on the

merits, too, why is somebody who has suffered a half million dollars in noneconomic or economic damages denied $200,000.00, whereas somebody .....; they are placing the burden on exactly the people who are least able to bear them.

REPRESENTATIVE SPAETH stated that he thinks it is a little deeper question; philosophically he doesn't see any value in changing the limits at this stage of the game on the basis of what Representative Addy has argued; and he thinks what he is saying is there will be less appeals; fewer people challenging it; and thus, maybe for the next two years, it will slip through the crack in the floor; and he doesn't think that is a logical argument for changing it here today; he thought they have to have more substantive arguments than that. He stated that he would beg to differ with him.

CHAIRMAN BROWN advised that he did discuss this with Senator Turnage just briefly before he left; he did not have any great problem with it; he thinks it means the difference between passing or killing this bill; and quite frankly, he would like to vote this bill out of here and the members of the committee to support the bill.

REPRESENTATIVE RAMIREZ asked if he would run that by him again; it is going to make a difference as to whether this bill passes or fails on the floor.

CHAIRMAN BROWN said that he really did not see any sense in going with the same limits that were in the bill when it was first brought down, because it doesn't seem to him that with the language that is put in here is going to make any difference if the court comes back to look at it again; it seems to him that their only chance of making this acceptable and of saving the state some of that liability question is by raising those limits. He stated that if the court throws that out then, there is no recourse that they have.

REPRESENTATIVE KEYSER noted that the court didn't necessarily say that the amount was the big hangup, did they; it was the compelling interest.

CHAIRMAN BROWN commented that he can't believe that the economic question is that big of a deal in the court's decision.

A vote was taken on the proposed amendment of Represenative Addy and passed with 10 voting yes and 9 voting no. See ROLL CALL VOTE.

REPRESENTATIVE RAMIREZ said that he did not know if this bill is going to pass with that high a limit; he thought they should be more realistic; he really does; he would like to move to reconsider our action; they have to be more realistic about what they are going to to do with this bill; they don't have much time; he doesn't think the Senate is going to buy that kind of an increase; they don't have any idea what they are doing financially with that increase; they don't even have any idea finanacially with the $300,000/$1 million limit; they have no actuary studies unfortunately; it is a very unfortunate situation; but what you are going to do ....it is true you could force everybody into whatever limits you want to because there probably has to be some limits; but this bill has to get a two-thirds vote in order to pass. He thought he was putting the legislature and the state into a real difficult position, because you put those of us who feel that they cannot afford that limit still in the position of possibly having to vote for it simply because we can't afford not to; and he thought that was really an unreasonable position to put the legislature in.

REPRESENTATIVE ADDY responded that rather than a motion to reconsider we have a bill that says $1/$3 million; and if you want lesser limits, maybe you should move to amend the bill further with lesser limits; if they are going to argue between $300,000/$ 1 million, he thought they would argue until the sun goes down. He said that he realized that people that voted against the amendment are faced with this kind of a choice - how are they going to vote for the bill.

REPRESENTATIVE KEYSER noted that there were a lot of members absent here that didn't even listen to the proposals.

REPRESENTATIVE RAMIREZ said that he thought Representative Addy was right, but what he thinks is unfair is that you are forcing people to vote for something that is, on one hand, almost fiscally irresponsible.

REPRESENTATIVE ADDY replied that fiscally irresponsibility falls on both sides of the argument; and from your view, it doesn't; and from his view, it does. He commented that if Representative Ramirez wants to offer an amendment, offer it.

REPRESENTATIVE JENSEN asked for the question.

There was no further discussion.

REPRESENTATIVE ADDY moved that the bill BE CONCURRED IN AS AMENDED. REPRESENTATIVE JENSEN seconded the motion. The motion carried with 11 voting aye and 8 voting no. See ROLL CALL VOTE.

The meeting adjourned at 2:22 p.m.

Dave Brown
DAVE BROWN, Chairman

Alice Omang
Alice Omang, Secretary

STANDING COMMITTEE REPORT

April 19, 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE JOINT RESOLUTION ~~xxx~~ Bill No. 47

First reading copy (white color)

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THAT AN INTERIM STUDY BE CONDUCTED TO EXAMINE THE STATUS OF MONTANA-CANADIAN RELATIONS AND PROVIDE RECOMMENDATIONS ON HOW STATE GOVERNMENT CAN BECOME BETTER EQUIPPED TO DEAL WITH BORDER ISSUES.

Respectfully report as follows: That HOUSE JOINT RESOLUTION ~~xxx~~ 47

DO PASS

DAVE BROWN, Chairman.

STATE PUB. CO.
Helena, Mont.

COMMITTEE SECRETARY

STANDING COMMITTEE REPORT

April 19, 19 83

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration SENATE Bill No. 465

third reading copy (blue color)

A BILL FOR AN ACT ENTITLED: "AN ACT TO REVISE LIMITS OF RECOVERY IN TORT SUITS AGAINST THE STATE AND LOCAL GOVERNMENTS; AMENDING SECTION 2-9-101, MCA; REPEALING SECTION 2-9-104, MCA; PROVIDING FOR RETROACTIVE APPLICABILITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Respectfully report as follows: That JUDICIARY SENATE Bill No. 465

Be amended as follows:

1. Page 6, line 6.
Strike: "300,000"
Insert: "$1 million"

Following: "and"
Strike: "$1"
Insert: "$3"

AND AS AMENDED,
BE CONCURRED IN

~~DO PASS~~

DAVE BROWN, Chairman.

COMMITTEE SECRETARY

STATE PUB. CO.
Helena, Mont.

ROLL CALL VOTE ------ JUDICIARY COMMITTEE

	Date: 4/19 No: SB 465 Addy's amend.	Date: 4/19 No: SB 465 Be concurr. as amend.	Date: No:	Date: No:	Date No:	Date No:	Date: No:
BROWN, Dave	Yes	Yes					
ADDY, Kelly	Yes	Yes					
BERGENE, Toni	No	No					
BROWN, Jan	Yes *	Yes *					
CURTISS, Aubyn	No	No					
DAILY, Fritz	Yes *	Yes *					
DARKO, Paula	Yes *	Yes *					
EUDAILY, Ralph	No	No					
FARRIS, Carol	Yes *	Yes *					
HANNAH, Tom	No	No					
IVERSON, Dennis	No	Yes					
JENSEN, James	Yes	Yes					
KENNERLY, Roland	Yes	No					
KEYSER, Kerry	No	No					
RAMIREZ, Jack	No	No					
SCHYE, Ted	Yes	Yes					
SEIFERT, Carl	No	Yes					
SPAETH, Gary	No	No					
VELEBER, Dennis	Yes	Yes *					
*proxy votes	10-9	11-8					

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL HOUSE JOINT RESOLUTION 47 DATE Apirl 19, 1983

SPONSOR REPRESENTATIVE VINCENT

NAME	RESIDENCE	REPRESENTING	SUP-PORT	OP-POSE
Alice Stapley	Helena		✓	
Lilly Fitzgerald	Helena	Mont Ind Communities	✓	
Thomas L. Davis	B. Hwy			

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

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33
1-83

VISITOR'S REGISTER

HOUSE JUDICIARY COMMITTEE

BILL SB 465 DATE April 19, 1983

SPONSOR SENATOR TURNAGE

NAME	RESIDENCE	REPRESENTING	SUPPORT	OPPOSE
Chip Erdmann	Helena	MT School Bds Assoc	X	
[illegible]	Helena	Dept of Highways	X	
Alec Stanley	Helena	MT University Sys.	—	—
Lade Goss	Billings	Yellowstone Co. Commission	X	
Alec Hansen	Helena	League of Cities	X	
[illegible]	Billings		✓	
Turnage	Polson	Sponsor	✓	
Bill Verwolf	Helena	City of Helena	✓	
Mike Stephens	Helena	MT Assn of Cs	✓	
Karla Gray	Butte	MTLA		X

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

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

FORM CS-33

Exhibit A
SB 465
4/19/83

AMENDMENTS TO SENATE BILL 465
(Third Reading Copy)

1. Page 2, line 13.
Following: "FUND"
Insert: ". By April 15, 1983, for example, a total of 562 claims and legal actions for damages had been filed against the state and in only 247, or 44%, of these cases has a specific amount of damages been prayed for. Yet the damages prayed for in these cases amount to $83,956,446"

Exhibit B
SB 465
4/19/83

CLAIMS INFORMATION -- SENATE BILL 465

The following is a summary of self-insured claims activity against the State since July 1, 1977:

Total claims filed		562 (544)
Total amount - prayed claims	$83,856,446	
Total claims - no prayed amount (56% of total claims)		315
Number of active lawsuits		144 (146)
Total claims - settled or dismissed		258
Total reserved losses with 2-9-104, MCA, limits	$ 4,382,684	
Total reserved losses without 2-9-104, MCA, limits	Unknown at this time	

Outside Counsel Fees by Fiscal Year

FY 78	FY 79	FY 80	FY 81	FY 82
$7,957	$11,999	$57,531	$80,309	$142,140

Total Claims Paid

July 1, 1977 through December 31, 1982	$1,237,558
January 1, 1983 through April 14, 1983	$1,502,961
Total	$2,740,519

WITNESS STATEMENT

Name Erik B. Thueson Committee On Judiciary

Address Great Falls Montana Date

Representing Hoyt & Trieweiler Support

Bill No. SB 465 Oppose ~~SB 465~~

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Meaning of White v. State & relation to SB465

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 Paul Smith Committee On

Address Boulder Montana Date

Representing Support

Bill No. Oppose

Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

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

WITNESS STATEMENT

Name James D Moore
Committee On Judiciary
Address Box1198, Kalispell
Date 4-19-83
Representing Self
Support
Bill No. SB 495
Oppose S.B. 495
Amend

AFTER TESTIFYING, PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

1. Arbitrary Classification.

2. Based on unresolved & inflated claims rather than actual experience.

3. And based upon six year old information & circumstances, respecting available ins. coverage,

4. Works a penalty upon the seriously injured.

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

FORM CS-34
1-83

LAW OFFICES OF
HOYT AND TRIEWEILER
P.C., A Partnership
501 SECOND AVENUE NORTH • P.O. BOX 2807 • TELEPHONE 406/761-1960 • GREAT FALLS, MONTANA 59403

John C. Hoyt
Terry N. Trieweiler
Erik B. Thueson
Kurt M. Jackson

Whitefish Office:
233 Second Street
Whitefish, Montana 59937
Telephone 406/862-4597

April 25, 1983

Secretary of the House
Judiciary Comittee
Room 224A
Capitol Building
Helena, Montana 59623

Dear Sir/Madam:

I represent Karla White, who we believe was injured as a result of the government's negligence. In connection with this lawsuit, we need certain documents and electronic recordings pertaining to the House Judiciary Committee's hearing held on April 19, 1983.

Therefore, I have had the Sheriff serve you with a copy of the Subpoena Duces Tecum, which requests that you produce these documents. The law requires that I take your deposition, but it is nothing to get concerned about. Basically, all you have to do is turn over the documents and the recordings requested.

Please give me a call. I will be happy to change the time, place, or even the manner in which you provide the materials we have requested. Let me know what will be convenient for you and I will contact the government's attorney and see if we can work things out.

Feel free to call our office collect.

Sincerely yours,

HOYT & TRIEWEILER

By: Erik B. Thueson

Erik B. Thueson

EBT:gkm

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF CASCADE

* *

KARLA WHITE, Plaintiff,	)	No. BDV-80-836
vs.	)	SUBPEONA DUCES TECUM
STATE OF MONTANA, Defendant.	)	

* *

THE STATE OF MONTANA SENDS GREETINGS TO: Secretary or Custodian of records for the House Judiciary Committee of the Legislature of the State of Montana, Room 224A, Capital Building, Helena, Montana:

YOU ARE COMMANDED, to appear and attend the deposition in the the Courtroom of the Courthouse for Lewis and Clark County, Helena, Montana, on the 2nd day of May, 1983, at 1:00 o'clock p.m., then and there to testify in the above-entitled action, now pending in the Eighth Judicial District of the State of Montana, on behalf of the plaintiff, and that you bring with you and produce, then and there, all documents, of any nature, electronic recordings, of any nature, taken at or pertaining to the House Judiciary Committee's hearing on Senate Bill 465, which took place on the 19th day of April, 1983.

Disobedience of this subpeona will be punished as a contempt of said Court, and you will also forfeit to the party aggrieved the sum of One Hundred Dollars, and all damages which may be sustained by your failure to attend.

WITNESS, the Honorable John M. McCarvel, Judge of the Eighth Judicial District of the Courthouse in the County of Cascade, and the seal of said Court this 25th day of April, 1983.

ATTEST: My hand and seal of said Court, the day and year last above written.

FLORENCE McGIBONEY

By: _____
Deputy Clerk

SHERIFF'S OFFICE
STATE OF MONTANA)
: ss.
County of Lewis and Clark)

I HEREBY CERTIFY, That I received the within Subpoena Duces Tecum on the_____day of_____, 1983, and personally served the same on the_____, day of_____, 1983, on:_____

_____

by showing said Subpoena to and delivering to said person(s) a true copy of same in the County of Lewis and Clark, State of Montana.

Fees - - - - $_____ Helena, Montana,_____

Service - - $_____ 1983,_____,

Copies - - - $_____ Sheriff,

Mileage,
_____miles $_____ By_____
Deputy Sheriff.

Sheriff's
Fee TOTAL - $_____

Montana Legislative Council
State Capitol
Helena, MT. 59620
(406) 449-3064

April 29, 1983

Mr. Erik B. Thueson
Attorney at Law
Hoyt and Trieweiler
501 Second Avenue North
Great Falls MT 59403

Dear Mr. Thueson:

This letter confirms our converation of April 28, 1983, in which you agreed that the enclosed certified copy of the House Judiciary Committee minutes of the April 19, 1983 hearing on Senate Bill No. 465 would be sufficient in lieu of and in satisfaction of the Subpoena Duces Tecum served on the secretary of that Committee on April 28, 1983, and that you will do all things necessary to quash or otherwise rescind the subpoena.

Sincerely,

Robert C. Pyfer

Robert C. Pyfer
Director of Legal Services

RCP:ee
Enc.
cc: Speaker Dan Kemmis
Alice L. Omang

PYFER/ee/Thueson 4/29/83

4828 Alice L. Omang

CERTIFICATE OF AUTHENTIC COPY

I hereby certify that I was secretary for the House Judiciary Committee, 48th Montana Legislature, that I was present at the hearing before such Committee on Senate Bill No. 465, which took place on April 19, 1983, that I prepared the minutes of such hearing, and that the attached are a true and correct copy of the minutes so prepared.

Alice L Omang

Alice L. Omang, Secretary
House Judiciary Committee
48th Legislature
April 29, 1983