MINUTES OF THE MEETING
JUDICIARY COMMITTEE
50TH LEGISLATIVE SESSION
HOUSE OF REPRESENTATIVES

February 9, 1987

The meeting of the Judiciary Committee was called to order by Chairman Earl Lory on February 9, 1987, at 8:00 a.m. in Room 312 D of the State Capitol.

ROLL CALL: All members were present with the exception of Rep. Eudaily who was excused and Rep. Hannah who was absent.

HOUSE BILL NO. 503: Rep. Bradley, District No. 79, stated that this bill grants a landowner immunity against claims of persons gratuitously touring or viewing cultural and historical sites and monuments on the landowner's property; excluding from immunity any claims arising from the landowner's wilful or wanton misconduct. Rep. Bradley submitted the current MCA statute 70-16-302 (Exhibit A) and stated that this bill extends the restriction on liability to permittees. The purpose of this extension is to allow Mr. Jim Dolan, A Montana sculpture artist to construct thirty-six outdoor sculptures to be placed throughout the State of Montana. These sculptures will represent Montana's heritage and pride. She submitted a booklet titled, Montana Spirit which outlines and names each sculpture and its' selected tentative locations. (Exhibit B).

PROPONENTS: MARCELLA SHERFY, Program Manager for the State Preservation Office, within the Montana Historical Society, stated that her office is responsible for encouraging the preservation of Montana's significant historic and prehistoric resources. Although the Historical Society is not directly involved in the project which generated a need for this legislation, they are strongly in support of it. She submitted written testimony. (Exhibit C).

JOHN WILSON, Administrator of the Montana Promotion Division, Department of Commerce, stated that the Governor's Council has endorsed the project that Rep. Bradley has outlined and urges support for this legislation.

There were no further proponents testifying and no opponents. There were no questions. Rep. Bradley closed the hearing on HB 503.

HOUSE BILL NO. 478: Rep. Thomas, District No. 62, sponsor, explained that this bill deals with limiting liability for the weed district. In cases of gross negligence or wilful acts, a district is liable for economic damages within the

limits established under 2-9-108. A district is not liable for noneconomic damages in excess of $10,000.00. A district is immune from liability for negligent acts other than those constituting gross negligence.

PROPONENTS: BILL HIETT, Montana Weed Control Association, stated that HB 478 provides a realistic approach to help weed districts obtain liability insurance. This legislation should make liability insurance more available to weed districts. He submitted written testimony (Exhibit A).

REID BISHOFF, Weed Control Supervisor for Galletin County, urged support for this bill.

SCOTT FLUER, stated he was in full support of this bill.

DOUG JOHNSON, Cascade County Weed District, Road Supervisor, offered an amendment to the bill to include mosquito control, rodent control and that the word "management" be included in the title (Exhibit B).

JO BRUNNER, Montana Water Development Association and the Montana Grange and Cattle Feeders, pointed out that those of us who are responsible for getting water to the lands that produce the food for you to eat are greatly concerned with our ability to provide the means for such delivery. We believe that we ought to be able to be covered with a reasonable liability insurance that should be beneficial to all concerned. I ask that you make a positive decision allowing these people to obtain adequate insurance. We would all be better off in the long run. She submitted written testimony (Exhibit C).

DEBBIE BRAMMER, Montana Association of Conservation District, stated that all districts are having the same problem with the unavailability of liability insurance and went on record to urge support for HB 478.

OPPONENTS: KARL ENGLAND, Montana Trial Lawyers Association, stated that noneconomic damage standards are addressed in this bill and passage of this bill would raise standards. He urged a serious look at this bill.

GEORGE ORCHENSKI, Montana Environmental Information Center, totally opposed this legislation. The "war on weeds" in Montana is for real. The Montana EIC supported the one million dollar grant from the RIT program last session for the establishment of the noxious weed control trust fund. We believe that noxious weeds are a serious problem that deserves a serious response, but we do not believe that HB 478 is the answer. This bill will only encourage an even more lax attitude toward extremely toxic substances. He

submitted written testimony and a packet of information on some of the effects of chemicals (Exhibit D).

JANET ELLIS, Montana Audubon Legislative Fund, stated that pesticides can be very dangerous. It would be a grave mistake to grant Weed Districts immunity from liability for negligent acts. Insurance companies and Weed Districts can hopefully find a solution to this problem. She urged a do not pass on HB 478. Written testimony was submitted (Exhibit E).

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 478: Rep. Rapp-Svrcek asked Rep. Thomas if he had knowledge of weed districts ever being sued and he stated to his knowledge they have never been sued.

Rep. Meyers asked Mr. Ochenski if the listed chemicals from his testimony are being used in Montana. He stated that he does not assume that all of the weed districts are using these chemicals but they do exist and some are being used. Rep. Meyers pointed out that at least three mentioned are condemned for use in Montana. Mr. Ochenski stated that he is asking that the laws not be relaxed to allow such chemicals to be used.

Rep. Addy asked Mr. Johnson if weed control districts have looked into being insured under Montana Municipal Insurance Agency and he stated that the agency does not have pollution coverage. Rep. Addy asked Mr. Johnson if we give immunity to weed control districts, why not give to all agencies and Mr. Johnson answered, "ok".

Rep. Thomas closed the hearing on HB 478 by explaining that this bill restricts liability insurance and helps set standards so that the weed districts can get back into business.

HOSUE BILL NO. 522: Rep. Asay, District No. 27, stated this bill regulates the amount of contingent fees that an attorney may receive and the statutory regulation puts things in a reasonable light.

PROPONENTS: JIM ROBISCHON, Montana Liability Coalition, stated the Coalition supports this legislation and submitted an example of an agreement form used between attorney and client (Exhibit A).

GERALD NEELEY, Mt. Medical Association, stated that the bills major provisions are for the statutory regulation of contingency fees by a reverse sliding scale contingency fee schedule. The percentage allowed decreases as the amount of the court award or settlement increases, but is not so

restrictive as to small or moderate recoveries that it hampers the ability of injured parties to obtain legal representation. Danzon and Lillard found that instituting a limit on lawyers fees reduced the percentage of cases dropped by five percentage points (i.e. lowered the plaintiff's asking price), reduced the fraction of cases litigated to verdict by 1.5 percentage points, and decreased settlement size by 9 percent. He submitted written testimony (Exhibit B).

ROGER TIPPY, Attorney, Montana Dental Association, supported this legislation.

OPPONENTS: PAT MELBY, State Bar Association of Montana, opposed this bill and the Montana Association of Defense Council authorized him to state that they also oppose this bill.

KARL ENGLAND, Montana Trial Lawyers Association, stated that he has never seen a contingency fee agreement with amounts as high as Mr. Robischon presented. Mr. England stated that every person that walks into his office is given a choice of paying by the hour or by contingent fee and no one has ever offered to pay by the hour. He further pointed out that if this bill were to be enacted, then we should limit the amounts of all professionals. This bill is grossly unfair.

C.L. OVERFELT, Great Falls, Attorney, submitted written testimony, (Exhibit C). He stated that the mischief with HB 522 lies in the far end of the scale. By restricting attorney fees on the larger awards, it severely limits effective legal representation to those most in need of the contingent fee and most unable to pay for their representation on an hourly basis. The other objectionable aspect of this bill is that it interferes with the free enterprise system and the marketplace. This bill for no legitimate public policy reason would single out attorneys and restrict their income. He submitted an article from Case and Comment, by C.L. Mike Schmidt, titled, Contingent Fee: Key to the Courthouse (Exhibit D).

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 522: Rep. Darko asked Mr. Robischon how defense attorneys base their fees and he answered that it is almost entirely on an hourly basis. He also stated that insurance companies contact defense attorneys and ask them their hourly rates before settling a case. Rep. Darko commented that she just does not see the fairness of this bill.

Rep. Meyers asked Rep. Asay if the intent of the bill is to limit and he stated, "no". Rep. Asay stated that the bill

does not limit earnings but it does limit the amount of windfall an attorney may receive.

Rep. Mercer stated that he finds it offensive in many ways that attorneys are singled out in this bill. He asked Mr. England to give some examples from his practice of a case based on a contingency agreement where these numbers have caused him to receive less and how much less that would be and if that would change his decision to represent that person effectively. Mr. England stated that cases from his practice would not be impacted by this bill but cases he has associated with other attorneys would fall below $150,000.00-200,000.00 range, and his fee would be well below the 40% of the first $25,000.00 recovery. A fee on an individual case is also negotiated even after the contingency agreement is signed and the recovery has been made.

Rep. Addy stated that this bill has been criticized as being one sided and wondered how Rep. Asay would feel about an amendment in regard to fees. Rep. Asay explained that the insurance companies are able to bargain a case before hand and he felt that if there were limits then there is room to bargain. Rep. Addy pointed out that it bothers him to see defense attorneys get paid more for losing than plaintiff's attorney's get for winning. Rep. Asay closed the hearing on HB 522 by stating that the legislature is the only place we can give the plaintiff a bargaining power.

HOUSE BILL NO. 344: Rep. Asay, District No. 27, sponsor, stated that this is a bill that revises the time limits for commencing a medical malpractice action and provides for an immediate effective date. He said that it is very important to realize the seriousness of this situation.

PROPONENTS: CHADWICK A. SMITH, Montana Hospital Association, stated that one of the greatest public concerns at this time is the rising cost of medical care. This bill addresses one of the ways to keep medical costs down and it is strongly supported.

GERALD J. NEELY, Montana Medical Association, explained that the major concern of Montana physicians with respect to HB 344 is that the legislature deal with the matter of the statute of limitations for minors, by reducing the limitation period. Current law provides for the statute of limitations of minors to run after 19 years. Studies have shown a statistically-significant effect on pricing of insurance from reductions in the statute of limitations. He submitted written testimony (Exhibit A) and presented a hand out titled, The Health Care Crisis in Montana (Exhibit B).

JEFFREY H. STRICKLER, M.D., American Academy of Pediatrics, stated that this is a reasonable bill.

ROGER TIPPY, Montana Dental Association, pointed out that enactment of this revision to the medical malpractice statute of limitations should improve the tort law of Montana. He submitted written testimony (Exhibit C).

JIM ROBISCHON, Montana Liability Coalition, supported this legislation.

KARL ENGLAND, Montana Trial Lawyers Association, pointed out that the bill needs a lot of work. The purpose of the statute of limitations is to give people a reasonable time and a dispassionate look at the case. The major change in the bill is found on page 2, line 10, where the lines are crossed out. The bill states that the statute of limitations begins to run on the date that the act, error, or omission is alleged to have caused the injury, or a condition resulting from the injury, or death. He stated that the statute of limitations must be written very carefully and he felt that the five year date in the bill is too short.

There were no further proponents and no opponents.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 344: Rep. Mercer asked Mr. Neely if he had a response to Mr. England's statements. He stated that he agreed with Mr. England's suggestions on the bill.

Rep. Asay closed the hearing on HB 344.

ADJOURNMENT: There being no further business to come before the committee, the hearing was adjourned at 12:55 p.m.

Earl Lory

EARL LORY, Chairman

DAILY ROLL CALL

JUDICIARY COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date Feb. 9, 1987

NAME	PRESENT	ABSENT	EXCUSED
JOHN MERCER (R)	✓		
LEO GIACOMETTO (R)	✓		
BUDD GOULD (R)	✓		
AL MEYERS (R)	✓		
JOHN COBB (R)	✓		
ED GRADY (R)	✓		
PAUL RAPP-SVRCEK (D)	✓		
VERNON KELLER (R)	✓		
RALPH EUDAILY (R)		✓	✓
TOM BULGER (D)	✓		
JOAN MILES (D)	✓		
FRITZ DAILY (D)	✓		
TOM HANNAH (R)		✓	
BILL STRIZICH (D)	✓		
PAULA DARKO (D)	✓		
KELLY ADDY (D)	✓		
DAVE BROWN (D)	✓		
EARL LORY (R)	✓		

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A

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HB# 203

notice in writing that the repairing of such fence is necessary, build or repair such fence at the expense of the party so neglecting or refusing, the amount so expended to be recovered from him; and the party so neglecting or refusing, after receipt by him of the notice above provided, is liable to the party injured for all damages he may sustain thereby.

History: En. Sec. 1118, 5th Div. Comp. Stat. 1887; re-en. Sec. 3257, Pol. C. 1895; re-en. Sec. 2089, Rev. C. 1907; re-en. Sec. 6782, R.C.M. 1921; re-en. Sec. 6782, R.C.M. 1935; R.C.M. 1947, 67-807.

70-16-210. Removal of partition fence. If the occupants of adjoining lands build their respective portions of a partition fence and either of them at any time desires to suffer the land occupied by him to lie open, he may, after having given to the occupants of the adjoining land at least 6 months' notice of his intention so to do, remove his proportion of the partition fence unless such adjoining occupant pays or tenders to him the value thereof. If such fence be removed without notice or after payment or tender of the value as aforesaid, the person removing the same is liable to the person injured for all damages he may sustain thereby.

History: En. Sec. 1117, 5th Div. Comp. Stat. 1887; re-en. Sec. 3256, Pol. C. 1895; re-en. Sec. 2088, Rev. C. 1907; re-en. Sec. 6781, R.C.M. 1921; re-en. Sec. 6781, R.C.M. 1935; R.C.M. 1947, 67-806.

Part 3

Gratuitous Permittee for Recreation

Part Cross-References

Recreational use of streams, Title 23, ch. 2, part 3.

Limitation on landowner liability to recreationists, 23-2-321.

Liability, Title 27, ch. 1, part 7.

70-16-301. Recreational purposes defined. "Recreational purposes", as used herein, shall include hunting, fishing, swimming, boating, water skiing, camping, picnicking, pleasure driving, winter sports, hiking, or other pleasure expeditions.

History: En. Sec. 2, Ch. 138, L. 1965; R.C.M. 1947, 67-809.

Cross-References

"Recreational use" defined, 23-2-301.

70-16-302. Restriction on liability to permittee. A landowner or tenant who permits, by act or implication, any person to enter upon any property in the possession or under the control of such landowner or tenant for any recreational purpose without accepting a valuable consideration therefor does not by granting such permission extend any assurance that such property is safe for any purpose or confer upon such a person the status of invitee or licensee to whom any duty of care is owed, and such landowner or tenant shall not be liable to such person for any injury to person or property resulting from any act or omission of such landowner or tenant unless such act or omission constitutes willful or wanton misconduct.

History: En. Sec. 1, Ch. 138, L. 1965; R.C.M. 1947, 67-808.

Exhibit 1.

EXHIBIT B
DATE 2-7-87
HB # 203

MONTANA ~~PRIDE~~

STATEMENT OF PURPOSE

In 1889 our forefathers embarked on a new path for Montana. The Buffalo made way for cattle and sheep; the Indian was subdued and wheat was planted where Buffalo Grass grew for thousands of years. Montana was entering a new era.

In 1989 Montana will enter yet another era, as dramatic as was the one a hundred years ago. The heritage of Montana is rich beyond its natural resources, it lies within its people and their dreams.

I am proposing a project which I believe will act as a focus and also a catalyst for better times for Montana. This project will consist of thirty-six outdoor sculptures placed throughout the State. These sculptures will represent Montana's heritage and pride. I am proposing that the majority of these sculptures be placed along the major highways of Montana. This will accomplish two things. First it will remind Montanans that we have a very colorful and unique heritage of which we should all be proud. The second will be the impact on our visiting guests to this State. Our State is wide and deep and with sculpture accessible, visitors will learn about Montana and will want to spend more time here. This will help make Montana a destination not a pass through State. Imagine the impact if our tourists spent an extra night or ate a few extra meals while traveling through the State. I believe this project will have that impact.

Response to my sculpture in Montana and throughout the Nation has led me to the conclusion that sculpture can say things that cannot be visualized in words or pictures. Art has a great influence on how the Nation views Montana and probably has had a greater impact than other forms of promotion. A good example is how Charlie Russell's work has been instrumental in how Montana is perceived by the rest of the Nation.

My proposal of major pieces of sculpture will set the pace for a new era for Montana. No sculptor to my knowledge has made his State a sculpture garden, and I say "Why not Montana"? Alexander Calder, famous for his mobiles, completed a piece for Grand Rapids, Michigan. This is now the focal point of this city. By the city's estimates two hundred thousand people a year come to Grand Rapids primarily to see Calder's sculpture.

Public Sculpture has been the reflection of civilization for thousands of years. Can you visualize Egypt without the Pyramids or the Sphinx? How about New York City without the Statue of Liberty? Visualize the image of South Dakota without Mount Rushmore! Obviously these are but a few examples. Ask the citizens and business people of Bozeman what public sculpture has done for their city; or what impact "Our Lady of the Rockies" has had on Butte?

I know how the rest of the nation views Montana. I travel with my work and am an ambassador for Montana. The images that people relate to me, about what they think Montana is, has largely been through our art.

All points of Montana have potential for sculpture and I visualize the State being covered geographically with this project because we are all one people bonded together in an uncommon land. This project will create a focus from within Montana and throughout the Nation that Montana is starting a new era and is proclaiming its pride for all to see.

EXHIBIT B
DATE 2-9-87
HB 503

MONTANA PRIDE

SITE LOCATIONS

I have selected tentative locations for twenty-four sculpture scenes as described below. With few exceptions the exact locations have not been identified. There are many more sites which may be suitable for a sculpted scene, and I am leaving these open as the circumstance dictates. It is my vision that I will sculpt in thirty-six locations for **Montana Pride**.

1. "Meat on the Hoof " (Buffalo Jump) - Three Forks area.

2. "Selling me Back for Underground Wages" (Underground Miners) - Butte area.

3. "Buffalo Tongue and Friendship" (Running Buffalo) - Wibeaux area.

4. "Don't Worry There'll Be Enough Indians for All of Us" (Seventh Cavalry) - Rosebud Creek and Yellowstone River area.

5. "You And I Sucked the Same Tit" (Lewis and Clark with Sacajewea, the Bird Woman, recognizing her brother) - Dillon area.

6. "Proving Up in Mr. Hill's Country" (Homesteading, Mr. Hills dream) - Havre area.

7. "Fresnos, Horses, Backs, and Bars" (Mullan and His Road) - Lookout Pass area.

8. "Oilriggers & Roughnecks" - Sunburst area.

9. "Bringing in the Harvest" (40 horse hitch) - Great Falls area.

10. "Chief Joseph and the Roche Jaune" - Laurel area.

11. "Following the Buffalo North" (Indians) - Wyola area.

12. "Flour, Blankets, Biscuits, and Whiskey" (Freighting with Bull Trains) - Fort Benton area.

13. "Wagons on the Bozeman Trail" - Greycliff area.

14. "Eight Horses and Strong Leather" (Logging with Horses) - Missoula area.

15. "Crosscuts and Sweenys, and Who's this Stihl Guy?" (Logging the North Country) - Libby area.

16. "Ma'te on the Whiskey Trail" - Shelby area.

17. "Handover Your Watches, Wallets, and Purses" (Stagecoach Robbery) - Monida Pass area.

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18. "Callouses, Grease, and Oil" (Wild Catters) - Bainville area.

19. "Second Verse Same as the First" (Gandy Dancers laying steel) - Billings area.

20. "When Social Security was a Hawkins" (Trappers on the Madison) - West Yellowstone area.

21. "Eight Hours to Bozeman, a Bath, and a Beer!" (Cattle Drive) - Bozeman Pass area.

22. "Turning Grass Wrong Side Up" (Horse Plowing) - Helena area.

23. "In the Shadow of the Mountains" (Lewis & Clark) - Cascade area.

24. "Plenty Good Grass, Many Tepees, and Fleshy Horses" (Indian Village and Pony Herd) - Billings/Hardin area.

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2-9-87
EX. # 503

MONTANA PRIDE

SCHEDULE

The schedule for Montana Pride will be stretched over several years extending beyond the Centennial celebration. I have scheduled four projects/locations for 1987. The first will be the "BUFFALO JUMP - MEAT ON THE HOOF" located near Three Forks. The second piece scheduled will be "RUNNING BUFFALO" near Wibaux greeting our visitors entering Montana from the East. The next two pieces will be announced as sponsors are secured.

I will be pursuing sponsors on a regular basis to ensure the continuation of this project and the completion of all thirty-six sites.

Exhibit B
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JIM'S HISTORY

I am a Montana immigrant. In 1966, at the age of eighteen, I fullfilled a dream by moving to Montana. I always thought I was spiritually born here and consider it the center of my earth.

I attended Montana State University and graduated with both a B.S. and M.S. in Agriculture. It was in my senior year of college that I started to sculpt and had thoughts of becoming sculptor. In 1972 I decided to sculpt full time. Since that time I have shown throughout the U.S. and have pieces in both Europe and Japan. The last couple of years the majority of my work has gone to the East Coast, primarily Virginia and Maryland. My public work in Montana is centered mostly in the Gallatin Valley.

Exhibit B
Date 2-9-87
HB # 503

RESUME

JIM DOLAN

ADDRESS:

3501 Airport Road
Belgrade, Montana 59714

AGE:

38

MARRIAGE STATUS:

Married, two children

BORN:

Los Angeles, California

ONE MAN EXHIBITS:

Museum of the Rockies, Bozeman, Montana
Montana Historical Society, Helena, Montana
National Wildlife Association, Atlanta, Georgia
National Wildlife Association, Phoenix, Arizona

CAREER:

In 1972 began fulltime Sculpting Career.

MATERIALS:

Steel, Stainless, Brass, Copper, Aluminum, and Bronze.

METHODS:

Welding processes and casting.

MAJOR AWARDS AND HONORS:

Included in television special on Montana Artists - 1981.
Filmed a television special presented on KUED, Educational Television, Salt Lake City, Utah.
"FLIGHT OF CANADA GEESE", Gallatin Airport Terminal, Belgrade, Montana - won a national award presented by the Federal Aviation Agency for art and architecture for Airports in America.
In 1979 elected membership in the Society of Animal Artists, New York City.

SUBJECT MATTER:

Birds, animals, human figures, abstracts.

PHILOSOPHY:

I try to create a feeling with my sculpture which allows the viewer to experience a new perspective of the subject matter. I enjoy working with diverse materials which draw out a new look at sculpture.

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MAJOR REPRESENTATIVE PUBLIC SCULPTURES

"FLIGHT OF CANADA GEESE", Gallatin Field Airport Terminal
Belgrade, Montana

"ELK HERD", First Citizens Bank
Bozeman, Montana

"PIONEER NELSON STORY", Lindley Park
Bozeman, Montana

"RISING MALLARDS", First Security Bank
Bozeman, Montana

"SNOW GEESE", Devils Lake Park
Devils Lake, North Dakota

"BIG HORSE - RUSTY"
Bozeman, Montana

"MINAGERIE OF EAGLES", Life of Montana Building
Bozeman, Montana

"BLACK BEARS", Rivers Park
Columbia, Maryland

"WHITETAIL DEER (PAIR)"
Columbia, Maryland

"BIGHORN SHEEP", Bighorn Center
Big Sky, Montana

"FAMILY OF EAGLES"
Tyson's Corner, Virginia

"CANADA GEESE"
Columbia, Maryland

"MALLARD PAIR"
Columbia, Maryland

"BALD EAGLE, CALIFORNIA CONDOR, WHOOPING CRANE, PEREGRINE FALCONS",
Metro Executive Terrace
Landover, Maryland

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"RUNNING MUSTANGS"
Ennis, Montana

"GLOBE", Baltimore Hotel
Bozeman, Montana

"WHITETAIL DEER"
Richmond, Virginia

"COWBOY ON HORSE", Conrad High School
Conrad, Montana

"BLACK PANTHER", Belgrade High School
Belgrade, Montana

"WARRIOR", Bozeman Jr. High School
Bozeman, Montana

"JAKE AND DAVE" (life size fishing scene), South Boulder Ranch
Cardwell, Montana

"ANTELOPE", Robie Stock Ranch
Ennis, Montana

EXHIBIT C
DATE 2-9-87
HB #503

Testimony in Support of House Bill 503

Mr. Chairman and members of the House Judiciary Committee:

I am Marcella Sherfy. I am the Program Manager for the State Preservation Office, within the Montana Historical Society. Our office is responsible for encouraging the preservation of Montana's significant historic and prehistoric resources. Although the Historical Society is not directly involved in the project which generated a need for this legislation, we are strongly in support of it. The listing of a property in the National Register of Historic Places or the designation of it as a Montana Heritage property does not, in any way, obligate property owners to provide access to it. Nonetheless, periodically owners of very interesting, architecturally unique, or archaeologically important sites argue against recognition or designation for their property because they fear that that will encourage visitation and will leave them liable for any injuries that visitors might sustain. Even more important, owners of historic ghost town or mining or homesteading remains sometimes destroy them rather than incur potential liability claims for injury that visitors might make. In particular, owners of historic mining properties feel very vulnerable to visitors and their subsequent injuries and claims. In clearly granting immunity to landowners from visitors who come to view historic buildings or remains--essentially uninvited and on their own--we believe that this legislation will encourage preservation of some sites that might otherwise be destroyed and encourage owners to seek recognition that such sites often warrant if our state's heritage is to be well understood.

Thank you.

EXHIBIT C
DATE 2-9-87
HB #503

WITNESS STATEMENT

NAME Marcella Shenfy BILL NO. 503

ADDRESS Helena DATE 2-8-87

WHOM DO YOU REPRESENT? Montana Historical Society

SUPPORT ✓ OPPOSE _____ AMEND _____

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 503 DATE 2-9-87

SPONSOR Bradley

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Marcella Sherfy	Helena	✓	
Dave Nelson	Helena	✓	
Doug Johnson	Great Falls	✓	
John Wilson	Helena	✓	
Deb Brammer	MACD, Helena	✓	
Bob Cowen	Boz. Chamber of Comm.	✓	
Carleen Lassiter	Mt Arts Council	✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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EXHIBIT A
DATE 2-9-87
HB # 478

TESTIMONY OF MONTANA WEED CONTROL ASSOCIATION
FOR THE HOUSE JUDICIARY COMMITTEE ON
HOUSE BILL 478
MONDAY, FEBRUARY 9, 1987

Chairman Lory and Members of the Committee. House Bill 478 provides a realistic approach to help weed districts obtain liability insurance.

Weed control districts have been unable to secure liability insurance to cover accidental spills and drift damage since 1985. This has caused several weed districts to stop or severely restrict their weed control programs. Unless liability insurance is available soon, many other districts will stop the use of herbicides because of the risk of a potential lawsuit. House Bill 478 would grant weed districts immunity from liablility for negligent acts and limit non-economic damages that could be recovered from a weed district. This legislation should make liablility insurance more available to weed districts.

The Montana Weed Control Association recommends full consideration of House Bill 478.

Bill Hewett
Montana Weed Control Assn.

EXHIBIT A RP
DATE 2-9-87
HB # 478

50th Legislature LC 1491/01
1-17

Sponsored Fred Thomas - Stevensville

H. B. BILL NO. 478

INTRODUCED BY _____

A BILL FOR AN ACT ENTITLED: "AN ACT GRANTING WEED (mosquito control, rodent control, and management) DISTRICTS IMMUNITY FROM LIABILITY FOR NEGLIGENT ACTS; LIMITING NONECONOMIC DAMAGES RECOVERABLE FROM A ~~WEED~~ (9) DISTRICT; AND AMENDING SECTION 27-1-701, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Liability restrictions. (1) A district is immune from liability for negligent acts other than those constituting gross negligence.

(2) In cases of gross negligence or willful acts, a district is liable for economic damages within the limits established under 2-9-108. A district is not liable for noneconomic damages in excess of $10,000.

(3) The provisions of 2-9-305 apply to board members, supervisors, and employees of a district.

Section 2. Section 27-1-701, MCA, is amended to read:

"27-1-701. Liability for negligence as well as willful acts. Everyone Except as otherwise provided by law, everyone is responsible not only for the results of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want

of ordinary care brought the injury upon himself."

NEW SECTION. Section 3. Codification instruction. Section 1 is intended to be codified as an integral part of Title 7, chapter 22, parts 21, 22, and 24, and the provisions of ~~Title 7, chapter 22, part 21,~~ each part. apply to ~~section 1.~~ the section codified to that part.

NEW SECTION. Section 4. Two-thirds vote. Because section 1 grants limited immunity from suit for mosquito control, rodent control, and weed management districts, a two-thirds vote of the members of each house of the legislature is required for passage under Article II, section 18, of the Montana constitution.

-End-

NAME Jo Brunner Date 2/9/87

Address 2015½ 9th Avenue, Helena HB 478

Telephone 442-2654

Representing Montana Water Development Association

Appearing on Which Proposal HB 478

Support x Amend Oppose

Comments:

Mr. Chairman, members of the committee, I represent the Montana Water Development Association at this hearing today. Our membership includes not only individual members, but representatives from businesses and industry and a great many water user associations and irrigation districts. Not specifically noted here we have a great interest in it many of our problems concerning weed spray are the same.

Those of us who are responsible for getting water to the lands that produce the food for you to eat are greatly concerned with our ability to provide the means for such delivery. A great many of our people are either not presently carrying liability or its cost is so exorbiant that we have had to cut back on other services we feel eqully necessary to the well being of our industry.

We, again of necessity, have to use weed spray to keep the ditches and canals open throughout the season. We, of necessity have to use aquatic herbicides, or our people are not able to get water out of the main canals. Ditch banks are perfect habitat for weeds and one cleaning prior to turning the water on in the spring does not carry through the full irrigation season.

We know that there have been and will continue to be mistakes and problems in the handling of the chemicals. But that is not to say that we are not concerned, and that we do not make the effort to eliminate those mistakes and problems, or that we feel we should be absolved from the blame when mistakes and problems occur. I see the care taken in spraying the ditches and We do believe that we ought to be able to be covered with a reasonable liability insurance that should be beneficial to all concerned.

Mr. Chairman, I live on an irrigation district. I've accompanied some of our people out when the used aquatic chemicals. I know the care they take. I also take Farm Journal and other magazines that occasionally carry material that spreads hysteria throughout the nation, perhaps sometimes with some justification.

I ask that you make a positive decision allowing These people to obtain adequate insurance. We all would be better off in the long run.

Grange
Cattlefeeders) include

#478
Exhibit

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The Montana Environmental Information Center Action Fund

February 9, 1987 • P.O. Box 1184, Helena, Montana 59624 (406)443-2520

Mr. Chairman and members of the Committee, for the Record, my name is George Ochenski and I represent the Montana Environmental Information Center. We are totally opposed to House Bill 478.

The "war on weeds" in Montana is for real. The Montana Environmental Information Center supported the $1 million grant from the RIT program last session for the establishment of the Noxious Weed Control Trust Fund. We have a member of our Board who is a weed control district supervisor. We believe that noxious weeds are a serious problem that deserves a serious response.But we do not believe that HB 478 is the answer.

When considering granting immunity from liability to any entity, the risks and benefits must be closely weighed. In this instance, the risks far outweigh the advantages. Some of the most dangerous substances in our society are the herbicides that find wide application in everyday farm and ranch use. Only now is there a growing awareness of the effects of these chemicals on the health of those exposed to them.

I have included a packet of information on some of the effects of these chemicals. One serious effect is a documented increase in farm cancer rates. If you read these articles, and I would urge you to do so, you will see that most of the practices that are causing these cancers do not fall into the "gross negligence" category. They are simple mistakes from lack of training, caution, or error.

If you look at the Farm Journal article you will see a chart showing absorption rates for farm chemicals on various parts of the human body. I will call your attention to the fact that the simple act of urinating can expose a human being to 100 percent absorption through the scrotum. I do not call your attention to this fact as a scare tactic. But tell me, where in the gross negligence scale would this incident fall?

These deadly chemicals are literally everywhere in our environment now. Eat a fish out of Flathead Lake and you're getting Dieldrin, DDT, DDD, DDE, Alpha-BHC, and endrin with every bite. Take home a game bird or waterfowl to your

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family and you can be sure they are ingesting heptachlor and endrin with their pheasant or duck. As with so many things in our advanced society, we are only now beginning to understand the consequences of our actions; only now catching up to the realities that accompany sophisticated chemicals in everyday use.

As a society, we are drenched in chemical contamination. This bill would only encourage an even more lax attitude toward extremely toxic substances. We need to work together through better land management, careful application of selected herbicides, and developing biological control methods to control the spread of noxious weeds. We do not need to "cut her loose, let her buck and damn the consequences" because we have removed the liabilities.

HB 478 is the wrong approach to our problem. It is yet another attempt by the special interests of insurance companies to stack the deck in their favor by reducing not just liabilities, but responsibilities. As a society, we cannot afford to ignore our responsibility to the children of today and tomorrow. Do we impact those kids by drenching them with ambient chemical carcinogens? Or do we take the bull by the horns and reduce liability through care and education and reduction of toxic incidents.

Please vote for the latter and reject HB 478.

Thank you.

Farm Journal./MID-JANUARY 1987

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Chemicals and your health:

What's the risk?

By DALE MCDONALD

PHOTO DON ULTANG

"Farmers simply must do everything they can to protect themselves."
Bob Frazee (standing) with Leslie Quinn

Last year was a sobering year for anyone who handles agricultural chemicals. There were more danger signs than ever before that chronic exposure to pesticides can cause health problems. For example:

• A National Cancer Institute study in Kansas concluded that farmers exposed to herbicides for more than 20 days each year had six times the risk of developing non-Hodgkins lymphoma compared with nonfarmers. There was an eight-fold greater risk for farmers who mixed or applied their own chemicals. And farmers who did not use protective equipment had a 40% higher risk than those who did. The above-normal rates of cancer were associated with phenoxy herbicides, especially 2,4-D.

Even more sobering is the reason for the study. Maps prepared by the National Cancer Institute in the mid-1970s revealed that rural regions in the central United States had elevated death rates from cancer.

• The EPA ordered a special review of alachlor, the active ingredient in Lasso, because it is a suspected carcinogen. The product was left on the market, but it is in the process of being reclassified as a restricted-use pesticide. Canada suspended alachlor after finding the herbicide in drinking water.

A study in Wisconsin, conducted by the U.S. Centers for Disease Control, linked exposure to aldicarb with changes in the immune system of 23 women. They were exposed by drinking contaminated well water.

• The Environmental Protection Agency warned that pregnant women exposed to dinoseb during its application may pose a risk of birth defects to their babies. The dangerous routes of exposure were listed as skin absorption and inhalation. EPA Deputy Administrator A. James Barnes said, "We want to make sure the agricultural community understands the health risks."

The list could go on, but the point is made—evidence is growing that farm chemicals may be more dangerous than you think. There is a compelling need for farmers to use masks, goggles, rubber gloves, boots, and even respirators to avoid contamination.

The nagging question is, "Do farmers who exercise reasonable care in routine operations absorb farm chemicals?" In an effort to answer that question, FARM JOURNAL funded a chemical contamination study conducted by the University of Iowa's Institute of Agricultural Medicine during last season's corn planting. Dr. Donald Morgan, professor at the Institute, designed a state-of-the-art urinalysis to detect low levels of insecticide contamination. And Bob Frazee, Extension adviser for Marshall-Putnam counties in Illinois, found 22 farmers willing to provide two urine samples—one before handling any chemicals, and one at the end of a day they handled chemicals. Five nonfarmers served as controls.

Of the 22 farmers tested, 13 applied organophosphate insecticides during the day the sample was collected. They included Lorsban, Thimet, Dyfonate

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Research with six human volunteers in California underscores the need for exacting safety precautions. The researchers measured the percent absorption of parathion on different parts of the anatomy:

Anatomy	% absorption
scalp	32.1
ear canal	46.5
forehead	36.3
forearm	8.6
palm	11.8
abdomen	18.4
scrotum	100.0
ball of foot	13.5

"This is critical information," says Bob Frazee. "If you have chemicals on your hands and you touch yourself while urinating, you're contaminated. If you let a chemical spill on the side of the tank and lean against it—you've got it. It can happen so easily.

"When you look at the many ways of getting contaminated—and now we have documented that this contamination takes place—farmers simply must do everything they can to protect themselves."

Part of the problem with commonly used hazardous chemicals—particularly the organophosphate insecticides—is that the symptoms of low-level poisoning closely mimic the symptoms of exhaustion or flu. After a string of physically exhausting 16-hour days, coupled with the strain of coping with bad weather and equipment breakdowns, who *hasn't* developed a headache? And yet a headache is a symptom of organophosphate poisoning 100% of the time.

Other symptoms include loss of appetite, nausea, dizziness, weakness and sweating. And it takes only a tiny amount of the most potent chemicals to produce symptoms. Dr. Morgan says, "With the granular insecticides we tested for, symptoms would result from absorbing no more than a teaspoonful in the hand."

Lysle Waters, field investigator for the Iowa Pesticide Hazard Assessment Project, has seen many poisonings that could have been avoided with proper care. He says, "We had a bad case of dermatitis on a farmer's feet caused by leather boots contaminated with propachlor. After he was well, he put the same leather boots on and it happened all over again.

"Another farmer was poisoned by Dyfonate—his corn planter broke down and he happened to sit in contaminated soil while he repaired it. He probably wore the clothing all day long. And one farmer was poisoned, we think, simply by digging bare-handed to check the depth of his planter's insecticide placement. With the really toxic chemicals that's enough to cause symptoms."

Don Kuhlman, Extension entomologist and pesticide coordinator at the University of Illinois, urges farmers to follow the safety instructions on the label. But he says, "It would help if pesticide manufacturers improved the labels so the print is larger and it's easier to find information on them. Instructions are often technical and hard to read, but some companies do a better job than others. Dow Chemical and American Cyanamid have better-than-average labels. Union Carbide, too. They are more readable, and the charts are easier to find information on."

To be safe, it's important to use all the proper safety equipment every time you handle hazardous chemicals (see following story). Don't take risks, and above all, don't get complacent.

"Some farmers do take the necessary precautions, but many more don't. According to Bill Hunt, "The attitude it's so easy to develop is this—'I've never suffered any side effects, so I'm either not getting chemicals in my system, or they don't bother me. I just always thought I was getting away with it.'"

FARM JOURNAL DOCUMENTS CHEMICAL CONTAMINATION

■ For a group of farmers in Illinois, last year's corn-planting season was like no other—they were volunteers in a FARM JOURNAL-funded study to detect low-level chemical contamination from insecticides.

Of 13 farmers who handled organophosphate insecticides, a sophisticated urinalysis showed that three absorbed small amounts of Dyfonate or Counter. Four others absorbed small amounts of Furadan. While *any* pesticide can be absorbed—not just these insecticides—the test was designed to detect these chemicals (for details see main story).

Dr. Donald Morgan, professor at the University of Iowa's Institute of Agricultural Medicine, designed the study. He says, "The results of this research show that pesticides used during corn planting were absorbed by some persons in contact with them.

"While the amounts absorbed were insufficient to cause symptoms, I urge all farmers to use maximum protective measures. In my experience, it has been unusual circumstances that have led to serious poisonings, rather than well-ordered operations. Broken equipment, spills left unattended, contaminated clothing, skin contact with drips and hoppers during repair—all have led to poisonings. As in so many occupational-hazard situations, it is constant vigilance that contributes the most to overall safety."

PHOTO GREG BAKER

TWENTY-TWO FARMERS from Marshall and Putnam counties in Illinois volunteered to take part in a study designed to detect chemical contamination.

Here's how to do it right

■ Time is not just money in the spring—it's health, too. Dan Chambers thinks it's well worth 30 extra seconds to safeguard his.

That's all the time it takes for the Piatt County, Ill., farmer to don gloves, goggles, overshoes and coveralls each time he mixes chemicals.

The death from cancer of a friend alerted Chambers and his family to the potential danger of herbicides and insecticides. "I always tried to be super careful around the boys," says Chambers, who credits son Dino with devising most of the safety precautions he follows today. "As for me, well, my wife Jean's a mighty pretty woman. I want to stick around to enjoy her company for a while."

Sweating a little inside coveralls and boots, or even a respirator, seems a small "premium" to pay for that kind of insurance, Chambers figures.

"Farmers have to be very careful about long-term, or chronic, exposure," says Purdue University safety specialist Bill Field. "Once your clothes become saturated with even a small amount of chemical, you're exposed to it as long as you wear those garments."

PHOTO: DAVE TONGE

DAN CHAMBERS, Piatt County, Ill., says it's worth the extra 30 seconds it takes to don proper safety gear.

"The most important thing you can do is to read the label and follow the recommendations," says University of Illinois pesticide applicator training specialist Fredric Miller. "Among the things you'll find there are the signal words Danger-Poison (highly toxic), Warning (moderately toxic) or Caution (low toxicity). Keep the degree of toxicity in mind. But actual degree of hazard is determined by toxicity plus length of exposure."

Chambers minimizes that exposure. He wears disposable coveralls made of water-resistant paper-like fabric (Du Pont's Tyvek—available from industrial-supply outlets) when filling pesticide tanks or hoppers. "If I spill anything, I burn that set," he says. "They cost only about $5 a pair, and four pairs usually get me through a season."

Along with the coveralls, Chambers keeps rubber gloves, overshoes and goggles in the truck that hauls his chemicals. "If you get chemicals on leather shoes, it will soak in to your skin when the leather gets wet," he points out.

"Both gloves and boots should be rubber or neoprene," says Miller. "They should be unlined, because cloth lining can absorb chemicals. Gloves should be at least 12" long to protect the wrist."

Chambers stores spare overshoes, gloves and goggles in the tractor cab in case he misplaces a pair or has a breakdown in the field. "I buy the overshoes a little large so they slip on and off easily," he notes. For cleaning plugged nozzles, Chambers wears thin, tight-fitting latex artists' gloves. "We get them from art-supply stores—$10 to $15 for about 50 pairs," he says.

Work clothes get washed as soon as Chambers finishes for the day. So does Chambers. "The washer is inside the back door," he says. "And it's only 2' from there to the shower."

Chambers's precautions include equipment as well as clothing. Stepladders make it easy to check fill levels of saddle tanks and shut off valves before the tanks can overflow.

Because most of Chambers's land is concentrated around his home, he usually returns to the farmyard to fill. "That way, I always have water handy for washing," he says. "But I keep a jug in the truck cab, too."

Chambers sets a 5-gal. bucket under the fill valve at the front of the tractor to catch spillage when the valve is disconnected. A pan placed beneath his portable inductor catches spills during mixing. And a metal frame inside the inductor rim prevents splashing if a can slips while he's pouring. At night, he parks equipment well away from the house. "I don't want to walk through an area of concentrated chemicals caused by years of drips and spills," he says.

As a final safety measure, Chambers plumbs all chemical (and anhydrous ammonia) lines and controls outside his tractor cab.

If a chemical label—which Chambers always reads—requires it, he dons a respirator. "Cartridge-type respirators, which contain replaceable filters, usually are sufficient for loading and mixing," says Miller. "They're especially important when handling pesticides where you may inhale dust particles, vapors or gases. Cartridge-type respirators cover only the mouth and nose, so you'll need goggles, too."

Filters in a cartridge-type respirator should be changed frequently during heavy spraying, Miller adds. If you'll be exposed to chemicals for a prolonged period or in an enclosed area (such as fumigating grain bins), you may need a canister or supplied-air respirator.

Some other tips: Mix chemicals where there is good light and ventilation. Keep containers below eye level when pouring, and stand upwind. Cut paper containers rather than tearing them. Do not work alone when handling highly toxic products. Rinse rubber gloves before removing them, and wash the gloves daily inside and out with detergent. Equip water hoses with check valves to prevent back-siphoning of chemicals into your water source.

"Remember that you need the same protective gear when spraying or wiping with an ATV as with a tractor," says Field. "Especially when the spray boom or wiper is in front, pant legs and shoes can become soaked with chemical."

The University of Illinois is compiling a list of firms offering protective equipment for handling pesticides. For a copy, contact Fredric Miller, 172 Natural Resources Building, 607 E. Peabody Drive, Champaign, Ill. 61820. You can also rent or buy a slide-tape presentation on "Signs and Symptoms of Pesticide Poisoning." Contact Emery Nelson, 101 Natural Resources Hall, East Campus, University of Nebraska, Lincoln, Neb. 68583. —Darrell Smith

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A Bitter Harvest

Farm chemicals linked to cancer

For years, farmers have suspected that the chemicals they use to control weeds and pests could make them sick—deathly sick. Now, it seems, they may have had real reason for their fears.

A study from the National Cancer Institute and the University of Kansas says farmworkers exposed to certain herbicides for more than 20 days a year run a much higher risk of developing lymphatic cancers than non-farmers—a frightening new development that fits into an emerging worldwide pattern.

The hazardous herbicides include phenoxy herbicides—especially one called 2,4-D (for dichlorophenoxyacetic acid), known also as Agent Orange, suspected as a cause of early cancers in Vietnam veterans.

The chemicals are found in many popular lawn and weed killers. In farm country, they're frequently used on pastureland, as well as such crops as wheat, corn, sorghum and rice.

Researchers studied 424 Kansas men who developed soft-tissue sarcoma—malignant tumors on muscle and connective tissue—Hodgkin's disease or non-Hodgkin's lymphoma from 1976 to 1982.

The study showed farmers had the same risk of developing soft-tissue sarcoma and a slightly lower risk of developing Hodgkin's disease as the general population. Farmers did run a 30% higher risk of developing non-Hodgkin's lymphoma than non-farmers.

Risk: However, that risk increased 600% for farmers who used herbicides. And farmers who actually mixed the chemicals saw their risk of contracting the disease jump 800%. The use of protective gloves and clothing slightly decreased farmers' chances of contracting cancer.

The study could have wide ramifications since the Environmental Protection Agency acknowledges that the report is "a very good one."

Conceivably, it could lead to rule changes curtailing the use of 2,4-D—60 million pounds of which is used in the United States each year, according to the EPA.

That's one facet of a problem initially recognized in author Rachel Carson's landmark book, "Silent Spring," which alerted the world to the potential dangers of pesticides and herbicides.

Only now is scientific research confirming a lot of people's worst fears — that the problem is much more extensive and insidious than originally thought, extending far beyond the United States' borders.

Even though authorities in this country have banned DDT and toxaphene, traces still show up in water samples around the world thanks to their continued use in Third World and eastern bloc countries.

Predatory: DDT, thought to promote cancerous tumors, was banned in the U.S. in 1972 after it was linked to thinning eggshells in predatory birds. Still, some 6,000 tons of it are still spread each year in Mexico, Central America and India.

Toxaphene—the most widely used pesticide in the U.S. until it was outlawed in 1982—has been linked to several cancers in lab animals.

Chlordane, used since 1947 to fight termites, also has been linked to malignant tumors, while other herbicides have been found to suppress blood-cell production in the bone marrow, which can lead to aplastic anemia.

The use of a potato-field herbicide called dinoseb has been temporarily halted by the Massachusetts Health Department after it was linked to birth defects.

Says Terry Bidleman, a University of South Carolina chemistry professor who's heading a pesticides-research team: "What the long-term effect of these continuing low levels of pesticides will be on humankind, we just don't know."

Noting what damage can be done, the National Park Service, which up to now has doused its 334 parks with some 100,000 pounds of pesticides a year, says it will halve that amount.

The service is also trying to use less-toxic compounds, such as boric acid, as well as such "biological" means of control such as beetles and caterpillars.

HAZLETON LABORATORIES AMERICA, INC. Chemical & E

3301 KINSMAN BLVD. • P.O. BOX 7545 • MADISON, WISCONSIN 53707 • PHONE (608) 241-447

REPORT OF ANALYSIS

EXHIBIT D
DATE 2-9-87
HB #478

GLENN PHILLIPS
STATE OF MONTANA
EPT. OF FISH WILDLIFE & PARKS
420 E. 6TH AVENUE
HELENA, MT 59620

SA
C
REF

FROZEN FISH: #97

PURCHASE ORDER NUMBER: 3827

CHLORINATED INSECTICIDE, PCB

PPM	COMPOUND
0.032	DDE
0.013	DDD
0.030	DDT
0.33	PCB
0.021	DIELDRIN
0.041	ALPHA-BHC
0.009	BETA-BHC
LESS THAN 0.005	LINDANE
LESS THAN 0.005	HCB
0.005	ENDRIN
0.005	H.E.
LESS THAN 0.01	MIREX
LESS THAN 0.10	TOXAPHENE
LESS THAN 0.005	ALPHA-CHLORDANE
LESS THAN 0.005	GAMMA-CHLORDANE
LESS THAN 0.005	NONA-CHLORDANE

METHOD REFERENCES

CHLORINATED INSECTICIDE, PCB
FDA PESTICIDE ANALYTICAL MANUAL, VOLUME 1, 2ND EDITION, SEC
(1968, REVISED 1969-1983@.
JOURNAL OF A. O. A. C., VOLUME 57, PAGES 168-172 (1974).
JOURNAL OF A. O. A. C., VOLUME 59, PAGES 174-187 (1976).

Vol. 16 No. 51

Pesticides are found in salmon

KALISPELL — In a news release titled "early warning," Region One of the Department of Fish, Wildlife and Parks reported last week that traces of pesticides had been found in kokanee salmon from Skidoo Bay on Flathead Lake.

Polution biologist Glenn Phillips, in FWP's office in Helena, said results of an analysis of seven kokanee taken for testing in May "showed traces of 16 different chlorinated hydrocarbon compounds."

But the report declared that most of the compounds were present in the fish at levels just above detection limits. All of the compounds were at concentrations well below the level set for safe human consumption, the report concluded.

It was noted that during the winter the Department will do additional testing of lake trout. The lake trout, or Macs, and bull trout feed on kokanee. Pesticide concentrations can increase as they move up through the food chain.

A more detailed report of the analysis of kokanee listed the presence of the following cholorinated hydrocarbon compounds: DDE, DDD, DDT, PCB, Dieldrin, Alpha-BHC, Beta-BHC, Lindane, HCB, Endrin, HE, Mirex, Toxaphene, Alfa Chlordane, Gamma Chlordane and Nona Chlordane.

An area fisheries expert, who saw the report but asked to remain unidentified, said, "The PCB's are significant. They were higher than anything else. The combination of all these things, I think is going to have an effect on the spawning abilities of the fish."

Diminishing spawning runs of kokanee from Flathead Lake have been recorded in recent years. This year the run count was higher than expected, although some observers have claimed that the increased numbers may have been due to closing the snagging season for salmon on their way up the Flathead River. Water releases from Hungry Horse Dam, a type of freshwater shrimp and possible pesticide contamination have all been identified as possible causes of the smaller spawning numbers.

Official surprised at toxic birds

HELENA (AP) — Initial findings from a delayed state Department of Fish, Wildlife and Parks study suggest pesticide contamination in waterfowl and game birds is still a potential health problem, an agency official said Tuesday.

"Preliminary indications are that we will continue warnings," said John Weigand, chief of the department's research bureau.

He was referring to warnings to hunters about preparing and eating waterfowl and upland game birds after tests in 1981 and 1982 showed elevated levels of endrin and heptachlor in the animals. The tests were prompted after farmers used the toxic pesticides to fight wireworms and an infestation of army cutworms on about 100,000 acres of wheat.

Weigand, who said the final report on the latest round of testing will be ready in about two weeks, expressed surprise at the continuing high level of pesticides found in about 40 waterfowl tested this fall.

Tentative results indicate either endrin is still in use or the substance is not disappearing from the environment as quickly as fish and game officials had hoped, he said.

Weigand had said in August that he expected to find little evidence of endrin or heptachlor because the state canceled endrin's registration in 1983 and banned heptachlor sales in October 1985. Farmers have been allowed to use existing stocks, but the amounts were thought to be small.

In addition, he said Tuesday, wildlife officials were optimistic after Agriculture Department studies indicated a marked decrease in the amount pesticides found in soils.

"We don't have all the answers," Weigand said. "There's a lot of biological and environmental variables."

The preliminary data showed pesticide levels of less than one part per million (ppm) but still more than the 0.3 ppm considered acceptable for a 150-pound adult by the U.S. Environmental Protection Agency, he said.

In the tests five years ago, the levels ranged from 1.2 ppm to 2.56 ppm.

The testing was to begin in mid-August and conclude a month later in time for the department to decide whether to issue warnings before hunting began. The agency planned to spend about $10,000 collecting and testing 70 waterfowl and 30 game birds.

But the project ran into so many delays that the department has collected only 40 waterfowl and no game birds, Weigand said.

The problems began immediately, when a waterfowl collection permit from the U.S. Fish and Wildlife was delayed for two weeks. The delay shortened the collection time because some migration already had started and threatened to upset efforts to test only Montana birds, Weigand said.

Also, one collection site was dry, many birds had late broods and some birds shot for testing were too small, he said.

Low populations were the major problem in collecting game birds, he said. Ravaged by two years of drought and heavy grasshopper spraying, there were few pheasant, huns and sharptail grouse to be found. "We didn't realize how serious it was until September," Weigand said.

On top of that, heavy rains caused flooding along the Hi-Line in late September, destroying prime collection areas for the birds, he said. The floods also delayed the winter wheat planting, a crucial element in the testing, since heptachlor is used to treat the crop, according to Weigand.

"It wasn't that we weren't trying," he said, shaking his head.

Because the department was unable to test upland game birds this year, the effort will have to begin again before the 1987 hunting season, he said, adding that testing of waterfowl next year will depend on the final results of this fall's work.

Weigand would not speculate on whether the warnings about contaminated waterfowl and game birds will be around a year from now.

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PROJECT BUDGET - FY 88 (For projects approved in FY 87)

Surcharge Collection:

Estimated Revenue	$125,000.00
Expenditures:	
Advisory Council	- 10,000.00
.25 FTE	- 5,000.00
Committed projects	- 78,813.00
Total Remaining for new projects FY 87/88	$ 31,187.00

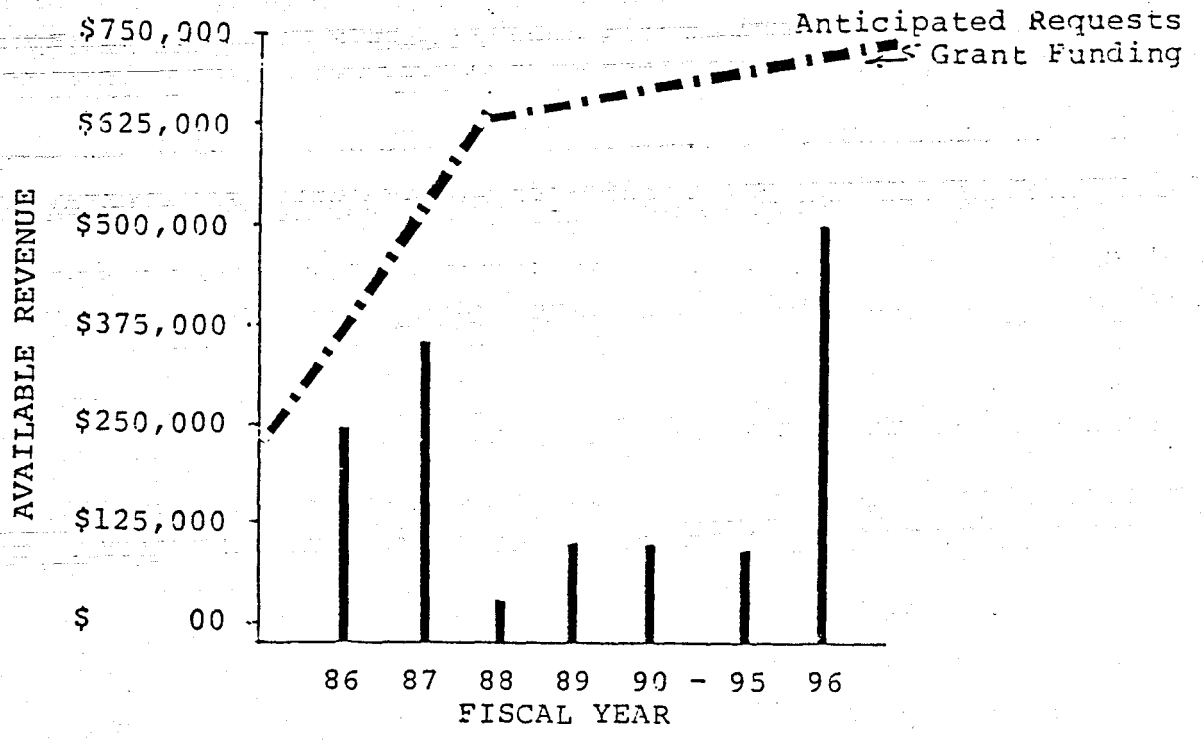

Figure 1: Available Revenue VS Requests for Grants. Available revenue by fiscal year is indicated by bars and acticipated requests for funds by the dashed line.

The problem we have is from 1988 through 1995, or until the interest income from the permanenet trust is available. The shortfall during this period comes at a time when interest in the program is high.

Montana's Noxious Weed Trust Fund and Cooperative Weed Management Programs

Introduction:

The Noxious Weed Trust Fund Act was approved by the 1985 Montana legislature. The purpose of the act is two-fold: (1) To provide technical and financial assistance to cooperative weed management projects; and (2) To establish a permanent trust fund for continuation of the weed management effort. The Trust Fund is administered through the State Department of Agriculture.

Funding:

Initial funding for the Trust fund was from a $1 million dollar grant through Montana's Resource Indemnity Trust Fund (RIT). Half of the grant was used to establish the permanent trust account and half was used to fund top-ranked weed proposals submitted under the RIT progam.

The trust fund and weed management programs will be perpetuated by a 1 percent herbicide surcharge. This tax will generate an estimated $250,000.00 annually, half of which builds the permanent trust account and half funds grant requests for cooperative weed managment projects. Within 10 years, the trust fund is expected to reach $2.5 million. The interest income generated from this fund, in addition to the herbicide surcharge, will provide an estimated $500,000.00 annually to help fund weed education and control programs in the state.

Application Proceedure:

Money is issued on a cost-share basis to counties or community action groups that submit a grant request. The grant application period is from November 1 to December 15. All requests are reviewed by the Noxious Weed Advisory Council. This council is composed of eight members representing various interests in the state: Donna Pratt, crop; Charles Hahnkamp, livestock; Jim Richard, sportsman/wildlife; Joe Widhalm, dealer/applicator; Martha Dow, consumer; Bob Thoft, biocontrol; Wayne Pearson, Montana Weed Control Association; and John Teigan, at large member. Keith Kelly, Director of Dept. of Ag., serves as chairman of the committee. Application forms for the grants can be obtained from Celestine Lacey, Department of Agriculture, Capitol Station, Helena, MT 59620.

General Technical Report PNW-149
February 1983

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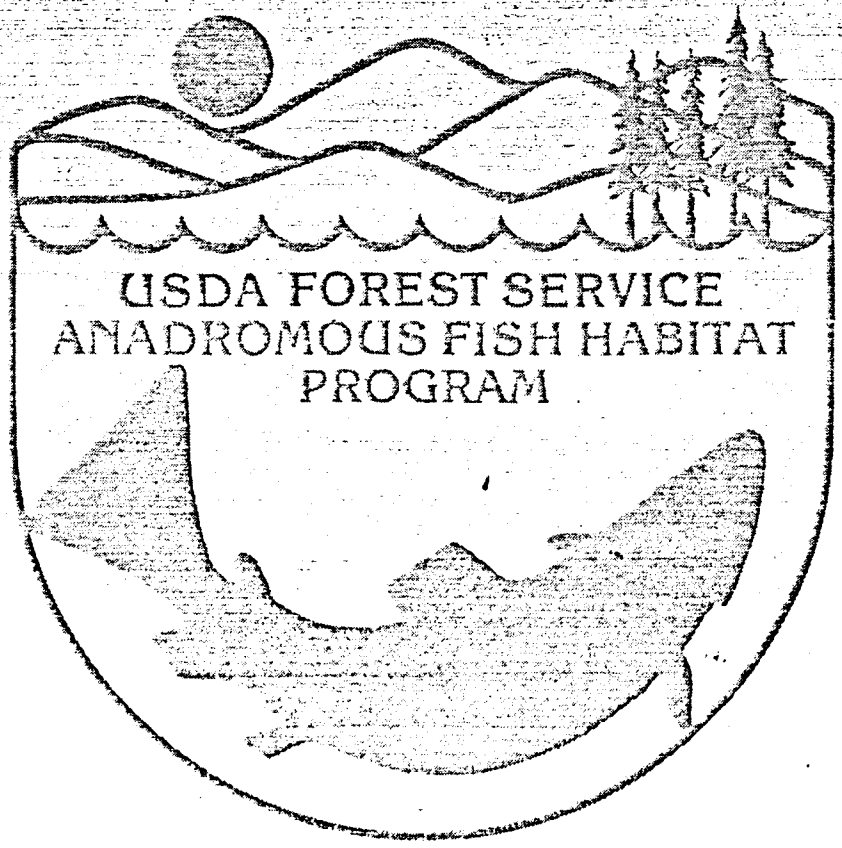
Influence of Forest and Rangeland Management on Anadromous Fish Habitat in Western North America

FOREST CHEMICALS

L.A. NORRIS, H.W. LORZ and S.V. GREGORY



U.S. Department of Agriculture Forest Service
Pacific Northwest Forest and Range Experiment Station

The chemicals used in forestry may have direct or indirect effects or no effect on anadromous fish. Direct effects require that the organism and the chemical come in physical contact. Once in contact, the chemical must be taken up by the organism and moved to the site of biochemical action where the chemical must be present in an active form at a concentration high enough to cause a biological effect (fig. 1). Direct chemical effects can be evaluated by using traditional concepts of toxicology and dose-response relationships.

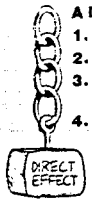


Figure 1.--A direct chemical effect requires that a chain of events takes place, including direct contact between the organism and the chemical, uptake of the chemical and its movement to the biochemical site of action, and residence at the site of action in an active form, in sufficient quantity and long enough for a direct effect to occur.

Indirect effects result from chemically induced modification of the habitat, rather than from the direct interaction between the chemical and the organism. Examples of indirect effects are insecticide-induced decreases in the biomass of terrestrial or aquatic insects resulting in a decrease in the supply of food for anadromous fish, and reduction in cover, shade, and sources of food from riparian vegetation as a result of herbicide deposition in a streamside zone.

DIRECT CHEMICAL EFFECTS

One of the hazards of using chemicals in the forest is the risk of direct adverse toxic effects on nontarget organisms. The two factors that determine the degree of hazard are the toxicity of the chemical and the likelihood that nontarget organisms will be exposed to toxic doses. Toxicity alone does not make a chemical hazardous, exposure to a toxic dose must also occur. Therefore, an adequate hazard assessment requires equal consideration of both the likelihood of exposure and the toxicity of the chemical (Norris 1971a, Sanders 1979).

TOXICITY IN AQUATIC SPECIES

Acute toxicity is the fairly rapid response of organisms to a few, relatively large doses of chemical administered over a short period of time. Chronic toxicity is the slow or delayed response of organisms to many, relatively small doses of chemical administered over a long period of time. The kind of response (acute or chronic) depends on the magnitude of the dose and the duration of exposure.

EXPOSURE IN THE AQUATIC ENVIRONMENT

Aquatic organisms may come in direct contact with a chemical in water, sediment, or food. The rate and method of application and behavior of the chemical in the environment determine both the level and the length of time any particular chemical will be in one or more of these three compartments.

Chemicals in Water

Chemicals may enter water by one or more of the following routes: direct application, drift, mobilization in ephemeral stream channels, overland flow, and leaching. Each route of entry results in a different level and duration of entry and, therefore, a different magnitude and duration of exposure. The degree to which any particular route of entry operates depends on the nature of the application, characteristics of the chemical, and characteristics of the area treated.

Many forest chemicals are aerially applied by either fixed- or rotary-wing aircraft, although a large proportion of herbicides are applied by ground-based equipment such as hand-held nozzles fed from either high- or low-pressure pumping systems, backpack sprayers, air-blast sprayers, direct stem-injection equipment, or, occasionally, by scattering of pelletized chemical by hand (table 2). Aerial applications in or near aquatic zones present the greatest probability of introducing chemicals into the aquatic environment by either direct application or drift. Aerial applications away from aquatic zones do not offer any greater opportunity for chemical entry into water than any other type of application. Chemicals that are applied in or near aquatic zones with ground-based equipment can also enter streams by direct application and drift.

Direct application and drift are physical processes that are largely independent of the chemical properties of the material being applied. The principal variables are vertical and horizontal distance between the points of application and the exposed waters, physical characteristics of the material being applied (droplet or pellet size and characteristics of the carrier), atmospheric conditions (wind speed and direction, relative humidity, and temperature), and type of application equipment and its operating parameters. The concepts, principles, and practice of aerial application of pesticides are presented in a series of five papers (by Maksymiuk, Jasumback, McComb, and Witt) in the proceedings of a pesticide applicators' training course (Capizzi and Witt 1971), the proceedings of a workshop on behavior and assessment of pesticide-spray application (Roberts 1976), and a USDA handbook (U.S. Department of Agriculture 1976).

Direct Application to Surface Waters

Direct application is the route most likely to introduce significant quantities of chemicals into surface waters. It has the potential to produce the highest concentrations and, therefore, cause the most pronounced acute toxic effects. The duration of entry and the subsequent duration of exposure, however, will be brief--a few minutes to a few days (Norris and Moore 1971, Norris 1978). Concentrations that result depend on the rate of application and the ratio of stream-surface area to volume. The persistence of the chemical in the application zone depends on the length of the stream treated, the velocity of streamflow, and the hydrologic characteristics of the stream channel. The concentration of

introduced chemicals normally decreases rapidly with downstream movement because of dilution and the interaction of the chemical with various physical and biological components of the stream system.

Drift From Nearby Spray Areas

Drift from nearby spray areas is similar to direct application except that peak concentrations are lower and the probability of impacts on stream organisms is reduced. Accidental drift of chemical from nearby spray areas to stream surfaces is a likely means of chemical entry into surface waters, but one that can be minimized through careful selection of chemical formulations, carriers, and equipment, and attention to atmospheric and operating conditions.

Mobilization in Ephemeral Stream Channels

Ephemeral stream channels are difficult to see from the air and may be sprayed along with the rest of the area. The problem may be more acute during aerial applications, because ground applications usually provide greater opportunity for avoiding these areas. Residues remaining in ephemeral stream channels are available for mobilization by the expanding stream system (described by Hewlett and Hibbert 1967) that develops during heavy precipitation. This process probably accounts for increases in chemicals occasionally observed in streams during the first storms after application (Norris 1967, Norris et al. 1978, 1982).

Overland Flow

Overland flow occurs infrequently on most forest lands because the infiltration capacity of the forest floor and soil is usually far greater than rates of precipitation (Rothacher and Lopushinsky 1974). Bare and heavily compacted soil may yield surface runoff, but these areas are not widespread and would seldom be treated with forest chemicals.

Leaching

Leaching of chemicals through the soil profile is a process of major public concern, but it is the least likely to occur in forest environments. Most chemicals used in forestry are relatively immobile in soil. Intense leaching can move chemicals a few centimeters to 1 m in depth, but these distances are short in comparison to distances between treated areas and streams (Norris 1971b). Most forest chemicals do not persist long enough for significant leaching to occur.

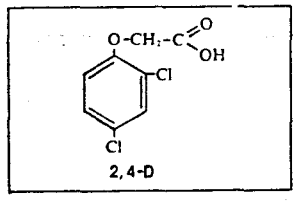
The various routes of chemical entry into streams result in widely different degrees of exposure to aquatic organisms. Direct application and drift are likely to result in the highest concentrations of chemicals in water, but persistence is brief. Mobilization in ephemeral stream channels and overland flow are associated with periods of significant precipitation, therefore, the concentrations in the water will be substantially less than those resulting from direct applications, although the duration of exposure may be slightly longer. Leaching (if it occurs) can introduce only small amounts of chemical into the stream, although the process could be prolonged.

The degree to which any one of these routes of entry is involved depends on the properties of both the chemical and the environment. Properties of the chemical (such as vapor pressure or solubility in water) and the properties of the environment (such as temperature, moisture, and soil characteristics) interact to

Information on rates and methods of application and carriers for pesticides are in the "Oregon Weed Control Handbook" (Whitesides 1981), the "Oregon Insect Control Handbook" (Capizzi and Fisher 1977), and "Pesticide Uses for Forestry."[3/]

HERBICIDES

2,4-D



2,4-D

2,4-D is one member of a large family of phenoxy herbicides which have been reviewed by the National Research Council of Canada (1978) and Norris (1981). The most extensively used herbicide in forestry, 2,4-D is formulated as water-soluble amine salts for direct stem injection or as esters that are usually dissolved in diesel oil or emulsified in water for aerial or ground application to foliage or bark. Rates of application between 1.12 and 4.48 kg/ha are common. More specific information on the use of this herbicide is reviewed by National Forest Products Association (see footnote 3) and Newton (1981).

Behavior in the Environment

The physical-chemical properties of the acid, salt, and ester forms of 2,4-D are pertinent because the herbicide may be in the environment in any of these forms. It is usually applied as the ester, but is rapidly hydrolized under most circumstances to either the acid or the salt form, depending on the pH of the environment (Paris et al. 1975, National Research Council of Canada 1978, Norris 1981).

The acid of 2,4-D is soluble to about 900 mg/liter at 25 °C in water. The dimethylamine salt of 2,4-D is extremely soluble in water (300 g/100 g) and other polar solvents, such as alcohols and ketones, but it has low solubility in kerosene and diesel oil. Many 2,4-D esters are available; those commonly used in forestry are low in water solubility (less than 500 mg/liter) but are very soluble in organic solvents and oils. The acid and salt forms of 2,4-D have negligible vapor pressure, which means they are not very volatile. The vapor pressure of esters varies from 10^{-2} mmHg (high-volatile esters) to 10^{-6} mmHg (low-volatile esters).

The methyl, ethyl, propyl, isopropyl, butyl, and amyl esters are called high-volatile esters. They are not used in forestry. Propylene glycol butyl ether (PGBE), isooctyl, butoxyethyl, 2-ethyl hexyl, and propylene glycol esters (and others of similar properties) are called low-volatile esters and are commonly used in forestry. House et al.,[4/] National Research Council of Canada (1978), and Weed Science Society of America (1979) review the physical-chemical properties of 2,4-D in more detail.

2,4-D persists in soil for only short periods. Research reviewed by House et al. (see footnote 4) indicates microbial decomposition is the predominant process of 2,4-D disappearance from soil. Environmental factors that favor rapid microbial metabolism also favor the disappearance of 2,4-D from forest floor and soil. Recent research reviewed by National Research Council of Canada (1978) and Norris (1981) support these conclusions.

[3/] Unpublished report, "Pesticide uses for forestry," prepared by Natl. For. Prod. Assoc., Washington, D.C., 1980.

[4/] Unpublished final report, "Assessment of ecological effects of extensive or repeated use of herbicides," by W. G. House, L. H. Goodson, H. M. Gadberry, and K. W. Dockter, Contract DAHC 15-68-C-0119, Advanced Res. Proj. Agency, Dep. Defense, Midwest Res. Inst. Proj. 3103-B, Kansas City, Mo., 1967.

EXHIBIT E
DATE 2-9-87
HB #478

Montana

Audubon Legislative Fund

Testimony on HB 478
February 9, 1987

Mr. Chairman and Members of the Committee,

My name is Janet Ellis and I'm here today representing the Montana Audubon Legislative Fund. The Audubon Fund is composed of 9 chapters of the National Audubon Society and represents 2500 members in the state.

The Audubon Fund opposes HB 478.

Pesticides can be very dangerous. For that reason the state and federal government have set up a system for testing, registering, using, training applicators, etc. - a system designed to take as may precautions possible when dealing with substances that are frequently toxic.

Weed Disricts, because they use these often highly toxic chemicals, have found it difficult, if not impossible, to obtain liability insurance. Without insurance, they have greatly reduced their fight against weeds.

While we appreciate the situation Weed Districts find themselves in, we cannot support HB 478. Toxic pesticides can cause severe problems when misused - intentionally or unintentionally. Those "problems" range from death to spontaneous abortions to cancer. The public, our wildlife, and Weed District employees can all be impacted by misuse of pesticides. It would be a grave mistake to grant Weed Districts immunity from liability for negligent acts.

The Audubon Fund supports the "war on weeds" that Montana needs to continue. In our serach for a solution to Weed District insurance problems we have only come up with one possible solution: certain pesticides are either non-toxic or have a low toxicity. Couldn't Weed District and insurance companies reach some middle ground by seeking out "low risk" chemicals that could be used or requiring certain precautionary measures be taken before a more toxic chemical can be applied? Weed Districts could then get insurance if certain guidelines were followed.

Applying pesticides is a serious business because of the associated hazards. It would be wrong to exempt Weed Districts from liability laws because they deal with hazardous substances. ~~If~~ Insurance companies ~~care enough about Montana and Weed Districts care enough about getting their work done, these groups~~ can hopefully find a solution to this problem.

We urge you to vote "Do Not Pass" on HB ~~194~~ 478.

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 478 DATE 2-9-87

SPONSOR Thomas

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
PETROFF, Arthur R.	Bozeman	✓	
Bill Hiett	Helena	✓	
SCOTT FLUER	White Sulphur Springs	✓	
GEORGE OCHENSKI	MT. ENV. INF. CNTR		X
Deb Brammer, MACD	Helena	✓	
R.T. Ellis	Helena HVSD	✓	
J. Brammer	Helena MACD	✓	
Janet Ellis	Helena		X
Bob Corra	Boz Chamber	X	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

EXHIBIT A
DATE
DATE: 2-9-87
HB # 522

NAME: Jim Robischon

ADDRESS: Helena, MT

PHONE:

REPRESENTING WHOM? Montana Liability Coalition

APPEARING ON WHICH PROPOSAL: HB 522

DO YOU: SUPPORT? ✓ AMEND? OPPOSE?

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

EXHIBIT A
DATE 2-9-87
HB # 523

SECTION 1. STATEMENT AND SUBJECT OF EMPLOYMENT

Client hereby retains and employs attorney to represent him in prosecuting his claim against [redacted] and [redacted], resulting from [redacted]. Client empowers attorney to compromise the claim, with the consent of client, and to file such legal action as may be advisable in attorney's judgment.

SECTION 2. ATTORNEY'S FEES

Client shall pay to attorney, as attorney's fee for such representation, 33% of the net recovery for the claim described above, if settled prior to trial; 40% of the net recovery for the claim described above, for amounts recovered subsequent to the time of commencement of trial in a district court; and 50% of the net recovery for the claim described above, for amounts recovered subsequent to the time of the filing of a notice of appeal from a final district court judgment.

SECTION 3. COSTS AND OTHER EXPENSES

Costs, necessary disbursements, and reasonable personal and travel expenses incurred by attorney in advancing client's cause are to be borne by client and may be advanced by attorney, with reimbursement to be made from the gross proceeds of any recovery.

SECTION 4. ATTORNEY'S LIEN

Attorney is given a lien on the claim or cause of action, on any sum recovered by way of settlement, and on any judgment that may be recovered, for the sum and share mentioned above, as his fee; and attorney shall have all general, possessory, or retaining liens, and all special or charging liens known to the common law. Computation of the

EXHIBIT

amount of the lien will be made after deducting from the amount of recovery and returning to attorney any costs or other expenses advanced by him, as herein provided.

SECTION 5. EMPLOYMENT OF EXPERTS AND INVESTIGATORS

Attorney may, with the consent of client employ experts to examine and report to attorney the facts concerning client's claim. Fees charged by such experts may be advanced by attorney and charged against the recovery on the claim as advanced costs.

SECTION 6. ASSOCIATE COUNSEL

Attorney may in his discretion employ associate counsel to assist him in prosecuting client's claim, at attorney's expense.

SECTION 7. RETENTION OF ATTORNEY'S FEES AND ADVANCED COSTS FROM SETTLEMENT PROCEEDS

Attorney may receive the settlement or judgment amount and may retain therefrom his percentage attorney's fee pursuant to Section 2. Before disbursing the remainder to cleint, he may deduct therefrom the amount of costs and expenses advanced as provided in Sections 3 and 5.

SECTION 8. FAVORABLE OUTCOME NOT WARRANTED

Attorney makes no warranties or representations concerning the successful termination of this claim or the favorable outcome of any legal action that may be filed.

SECTION 9. FEE CHARGES TO CLIENT CONTINGENT ON RECOVERY

In the event no recovery is obtained on the claim that comprises the subject matter of this agreement, attorney will make no charges for his time, services or fees. Client shall, however, be responsible to reimburse attorney for all advances made under Sections 3 and 5.

IN WITNESS WHEREOF, attorney and client have executed this agreement on the day and year first above written.

LIMIT ON ATTORNEY CONTINGENCY FEES

A. SUMMARY - REVERSE SLIDING SCALE CONTINGENCY FEES - HB 522

The bill's major provisions are for the statutory regulation of contingency fees by a reverse sliding scale contingency fee schedule. The percentage allowed decreases as the amount of the court award or settlement increases, but is not so restrictive as to small or moderate recoveries that it hampers the ability of injured parties to obtain legal representation.

B. POLICY REASONS FOR LEGISLATIVE PROPOSAL

The general objectives of legislation concerning attorney fees and contingency fees in particular are:

- to protect claimants from having their recoveries directly diminished by high contingency fees thus increasing the amount of the premium dollar paid out to them, and at the same time having an impact on the number of claims proceeding to court.

- the above reason is especially important if other tort reform legislation could have the tendency to diminish the amount of compensation paid to injured parties; the proposal would thus cause the legal profession to bear part of the cost of the insurance problem - not the claimant - but only to the extent that attorneys are currently being overcompensated, thus relieving some of the concerns over the high cost of such insurance or its very unavailability

- to relate attorney fees more to the amount of legal work and expense involved in handling a case, as well as the special needs of the patient - such as in the case of a minor -- and less to the fortuity of the plaintiff's economic status and degree of injury.

- to give strength to the accepted precept that the proper determination of legal fees is central to the efficient administration of justice and the maintenance of public confidence in the bench and the bar

- to help insure that an attorney does not obtain a "windfall" simply because his or her client is very seriously injured and guaranteeing that the most seriously injured plaintiffs will retain the lion's share of any recovery secured on their behalf

C. SCIENTIFIC EVIDENCE OF LINK WITH DOWNWARD IMPACT ON PREMIUMS

The legislation has been shown to have a "downward impact" on premiums, i.e. the savings could be realized in the form of increases which are not as large as previously, and would not necessarily result in lower premiums, which no form of legislation can assure.

An actuarial survey undertaken by an independent actuarial firm at the request of the American Medical Association indicated a total savings in premiums of 9% of the premium dollar from legislation implementing a sliding scale contingency fee system. 1

Danzon and Lillard found that instituting a limit on lawyers fees reduced the percentage of cases dropped by five percentage points (i.e. lowered the plaintiff's asking price), reduced the fraction of cases litigated to verdict by 1.5 percentage points, and decreased settlement size by 9 percent.2

It is important to understand that plaintiffs can receive the same amount or more under reduced settlements where the amount of attorney fees are reduced.

Major authorities have urged such measures as a sliding scale contingency fee system. The American Bar Association's 1977 Commission on Medical Professional Liability supported the concept of sliding scale contingency fee regulation. 3

Strong support for such a concept was voiced by the 1973 study of the Department of Health, Education and Welfare:

> "The Commission recommends that courts adopt appropriate rules and that all states enact legislation requiring a uniform graduated scale of contingency fee rates in all medical malpractice litigation. The contingent fee scale should be one in which the fee rate decreases as the recovery amount increases." 4

D. CONSTITUTIONALITY OF LEGISLATION

Attorney fee limitations are not unusual. Twenty-six states have some form of statutory limitation or court rule control on lawyer

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1 November 22/29, 1985. American Medical News, p. 19. AMA General Counsel's Office commission of actuarial survey by Milliman & Robertson, Inc, New York. Survey: Actuarial Analysis of American Medical Association Tort Reform Proposals, September, 1985.

2 Danzon, Patricia M. and Lee A. Lillard, "Settlement Out of Court: The Disposition of Medical Malpractice Claims," Journal of Legal Studies, Vol. XII, No. 2, June, 1983, pp. 345-77.

3 American Bar Association. 1977 Report On The Commission On Medical Professional Liability. p. 150-151. The Report was rejected by the full American Bar Association House in 1977. The recommendation supported a court-ordered decreasing maximum schedule for contingency fees, provided "that such schedule should not be so restrictive, particularly with respect to small to moderate recoveries, that it hampers the ability of injured patients to obtain legal representation."

4 Department of HEW. Report Of The Secretary's Commission On Medical Malpractice. 1973, p. 34-5.

contingency fees in personal injury cases, whether applicable to all civil cases or just medical liability cases.

Montana statutes regulate the amount of attorney fees payable in estate proceedings, and use a sliding scale approach.

Likewise, the Federal Tort Claims Act limits fees to 25% of a judgment or settlement obtained after a court action has been filed, and 20 % of any recovery obtained prior to such filing. 5

The Social Security Act authorizes reasonable fees not in excess of 25% of the claimant's recover. 6

The Veterans Benefit Act contains a limit of Ten Dollars ($10.00) for anyone representing the claimant. 7

Regulation of attorney fees has been challenged as violating a wide range of constitutional rights. The validity of such legislative regulation of attorney fees is well-established in the courts.

The United States Supreme Court has upheld, against due process of law challenges, a federal statute limiting contingent fee recoveries to 20% of the amount recovered. Calhoun v Massie (1920), 253 U.S. 170, 40 S. Ct. 474, 64 L.Ed. 843. The California Supreme Court recently upheld a sliding scale contingency fee statute against a due process of law challenge in Roa v Lodi Medical Group, Inc., 695 P.2d 164 (Cal. 1985). Many other states have also upheld limits on contingency fees.

Only one court has sustained an attack on contingency fee limits on equal protection grounds. Carson v Maurer, 120 N.H. 925, 424 A.2d 825, 838-839 (N.H. 1980)(court overturned contingency fee sliding scale limited to medical malpractice cases on the grounds that regulation only in that area would make such cases less attractive to the plaintiff's bar and consequently would at least somewhat deter the litigation of legitimate causes of action, thus creating a potential impediment to injured individuals' access to courts and counsel).

Neither the limited nature of the statute nor the constitutional grounds (because of the passage of Initiative 30) present in the New Hampshire case are present with the proposed legislation.

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000. 2/87	LEGISLATIVE PROPOSALS - ATTORNEY FEES

5 28 U.S.C. sec. 2678.

6 42 U.S.C. sec 406(b)(1).

7 38 U.S.C. sec 3404. Although this provision has previously been upheld as constitutional, the U.S. Supreme Court currently has a case which might cause reversal of previous opinions.

EXHIBIT ____
DATE ____
HB ____

WITNESS STATEMENT

NAME C L Overfelt BILL NO H.B 522

ADDRESS 121-4th St. [illegible] DATE [illegible]

WHOM DO YOU REPRESENT? Self

SUPPORT ______ OPPOSE ✓ AMEND ______

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Comments:

Please see attached letter.

CS-34

EXHIBIT C
DATE 2-9-87
HB HB 522

Overfelt Law Firm, P.C.

Overfelt & Skorheim
Attorneys at Law

LAW FIRM OF
C.L. OVERFELT
RANDALL O. SKORHEIM
GENERAL-TRIAL PRACTICE

February 11, 1987

121 FOURTH STREET NORTH
EXECUTIVE PLAZA, SUITE 2E
GREAT FALLS, MONTANA 59401-2570
TELEPHONE (406) 727-4600

Secretary Renee Podell
Judiciary Committee
State Capitol
Helena, Montana 59620

Re: House Bill 522

Dear Secretary Podell:

I am submitting herein my prepared statement in opposition to House Bill 522. I was a registered witness at the hearing on Monday, February 9, 1987.

The mischief with House Bill 522 lies in the far end of the scale. By restricting attorney fees on the larger awards it severely limits effective legal representation to those most in need of the contingent fee and most unable to pay for their representation on an hourly basis - the catastrophically injured - the quadriplegic, the severely burned victim - etc, etc. The lifetime medical expense for these victims alone can run into several millions of dollars.

The other objectional aspect of this Bill is that it interferes with the free enterprise system and the marketplace. This Bill for no legitimate public policy reason would single out attorneys and restrict their income. This makes no more sense than a Bill that would restrict and limit the fees that a doctor, dentist, commodity broker, farmer, motel operator, artist, etc., etc. would have. I object to it from this point of view but most importantly I object to the fact that it limits the rights of injured persons to effective legal representation.

One further comment. Over the years I have represented about every walk of life in the practice of law. I have found that the majority of business type of clients are the first ones to seek legal representation via means of the contingent fee agreement. For example, breach of contract suits, collection work, business interference, etc. I think the good members of this committee will find that the very people advocating this Bill are the very same ones who will seek out an attorney to work on a contingent fee basis rather than pay an attorney on an hourly basis. I would suggest therefore to be fair to all of a lawyer's potential clients that the Bill encompass all law suits of whatsoever nature. Amusingly, the act excludes its very proponents.

I am enclosing herein an excellent article that appeared in Case & Comment that discusses many other aspects of the contingent fee

Exhibit C
Date 2-9-87
HB # 522

agreement.

Thanking you for your consideration.

Sincerely,

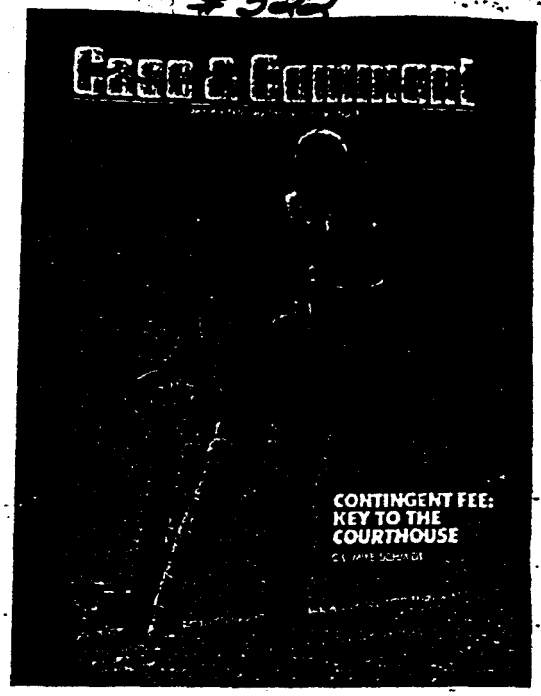
OVERFELT LAW FIRM

C L Overfelt

C.L. Overfelt

CLO:de
enclosure

Contingent Fee: Key to the Courthouse



by C. L. MIKE SCHMIDT

In this age of liability insurance crises and active tort reform movements, numerous proposals have been put forth to reform the American system of compensating tort and personal injury victims to correct perceived abuses in that system and to enhance the availability and affordability of liability insurance. One of these proposals is aimed at a personal injury plaintiff's right of access to the courthouse and right to competent legal counsel. That proposal seeks either the elimination of contingency fee contracts or the reduction of such contracts to rates so low that it becomes economically unfeasible for lawyers to undertake representation on that basis.

The Case for the Contingency Fee

The contingency fee legal contract was born in America during the early days of the industrial revolution. Such contracts were designed to serve two functions. The first function was to enable persons who could not afford counsel or the expenses of a lawsuit to retain a lawyer and go to court. This access to the courts and legal representation for meritorious claimants, regardless of their income or financial worth, is the primary policy justification for contingency fee contracts.

The sheer economics of the legal practice dictates that, if an attorney has to charge a client of limited means an hourly fee and his ability to collect that fee is questionable in many cases, the attorney is simply not going to undertake such representation. In personal injury cases the better attorneys are going to be forced out of the area of representation of personal injury plaintiffs and into other areas of the law in which clients can afford to pay higher hourly fees and in which the collection of a fee is certain. Lower or middle income clients who are forced to compete for attorneys' services on an hourly basis with insurance companies, business concerns, and others with more substantial resources ultimately will receive poorer quality legal services, if such services can be obtained at all.

The contingency fee furthers the availability of legal services and access to solid professional services on a *system-wide* basis in addition to furthering such goals on an individual-client basis. In cases on a contingency fee basis when the client is unsuccessful, the attorney receives little or no fee. Such cases would be analogous to the situation of a lender making bad loans. An attorney who could not in some manner compensate for such bad loans of his service would, of economic necessity, be forced to

C. L. Mike Schmidt is a partner in a Dallas, Texas law firm. A member of the Texas Bar, he received both his B.A. and LL.B. degrees from Southern Methodist University. This article was written especially for Case & Comment.

restrict the availability of such services in order to try to avoid encountering such "bad debts". The contingency fee arrangement enables the attorney to realize sufficient income from his "good loans" of services to offset his "bad loans" of such services and still remain profitable. The rates of return of both the lender and the attorney are subject to reasonable societal norms. The lender is subject to usury laws and the attorney, similarly, is subject to statutory, ethical, and judicial limitations on the reasonableness of the contingency fee in the context of an individual client. Such regulations, however, still permit a sufficiently adequate return to permit both the lender and the attorney to remain economically solvent while still making loans of money or legal services.

Increasing verdicts in personal injury cases over the years in large measure are due to the skill and ingenuity displayed by the plaintiffs' trial bar. The very fact that some believe there is a liability insurance crisis is itself testament to the fact that the contingency fee arrangement is fulfilling its policy functions of making quality legal services available on a widespread basis for non-wealthy individuals. After all, can anyone argue that effective, affordable liability insurance is any more of a worthy goal than effective, quality representation for all litigants?

Attacks on the Contingency Fee

If the system, then, is fulfilling its function, why is the contingency fee under attack? The reason for such attacks is not readily clear. The attacks themselves are generally on supposed abuses of the contingency fee contract which are alleged to have contributed to the "liability insurance crisis". Elimination or severe restriction of contingency fees to correct these supposed abuses, however, will not materially affect the availability or affordability of liability insurance and, to the extent that any effect at all is demonstrated, it will be at the cost of contravening the public policies in favor of availability of competent legal counsel to tort plaintiffs, regardless of wealth.

Frivolous Suits

The first abuse of the contingency fee often mentioned in support of proposals to restrict or do away with such fees is the argument that contingency fees spawn frivolous or non-meritorious litigation. Although this charge has never been statistically demonstrated by any of its proponents in the many years it has been made, theoretically at least there is some truth to this allegation. By making legal services more available and affordable, contingency fees are necessarily going to lead to an increase in *all* types of litigation, both of meritorious claims and non-meritorious claims. If access to the courthouse is broadened, people are going to utilize that access more frequently for all purposes. A necessary by-product of such broadened access is an increase, to some extent, in frivolous claims.

This necessary price for broadened access to the courthouse, however, does not justify destruction of the contingency fee system. Such destruction would, in all probability, lead to a decrease in the number of non-meritorious claims filed in the courts. It would do so, however, at the cost of choking off access to the courts for many *meritorious* claims. As early as 1940, a leading commentator on contingency fees noted that the societal costs of denying meritorious claimants their day in court was too great to abandon the contingency fee system in order to eliminate a smaller number of frivolous claims:

> The contingent fee certainly increases the possibility that vexatious and unfounded suits will be brought. On the other hand, it makes possible the enforcement of legitimate claims which otherwise would be abandoned because of the poverty of the claimants. Of these two possibilities, the social advantage seems clearly on the side of the contingent fee. It may in fact be added by way of reply to the first objection that vexatious and unfounded suits have been brought by men who could and did

pay substantial attorneys' fees for that purpose.[1]

The effect of the contingency fee on frivolous suits is a two-edged sword. Although *claimants* may be encouraged to bring such suits because of increased access to the courthouse, *plaintiff's attorneys*, whose compensation under the system is keyed to success, are systematically *discouraged* from bringing frivolous cases. An attorney who will be compensated only in the event of victory is much less likely than his hourly-paid rival to institute a suit he knows he is almost sure to lose. Plaintiff's attorneys who work under the contingency fee system serve an important function as a screening mechanism to keep patently unjustifiable claims from reaching the courthouse.

Elimination of frivolous claims would also have minimal effect on the availability and affordability of insurance rates. By definition, a lawsuit is not "frivolous" if it results in a multi-million dollar verdict against the defendant. It is the large amounts of jury awards and settlements in *meritorious* cases that are being primarily blamed for the liability insurance crisis by the proponents of tort reforms. Frivolous suits result in either a small amount of attorneys' fees being expended to defeat the claim or a small amount paid as "nuisance value" to settle the case and avoid defense costs. The effect of such added costs on the liability insurance system is trivial and is not a major component in the liability insurance crisis. If it were, efforts would also be made by the tort reform movement to curb attorneys' fees on the defense side, which are paid for directly by the insurance company and which are often, although incurred under an hourly fee system, in excess of the value of the claim itself. Although "frivolous suit" argument makes a good stalking horse, it is not the root cause of the problems which the tort reformers seek to address.

There are already in place a number of devices in state and federal legal practice to deal with such frivolous suits. Rules of procedure and statutes which mete out tough sanctions for abuses of discovery are proliferating throughout the country.[2] So are statutes and rules which permit a court, upon finding that a suit has been brought frivolously or in bad faith, to assess the defendant's attorneys' fees against the unsuccessful plaintiff.[3] Such sanctions now existing are more than adequate to deal with the problem of abuse of the system and do not involve nearly the societal costs that elimination of the contingency fee system would involve.

Risk Factor

A second charge leveled at the contingency fee system is that modern day tort practice has taken much of the risk out of the plaintiff's attorney's representation of his client, so that the contingency fee unjustly enriches the claimant's lawyer by compensating him for a supposed "risk factor" which is not really there. This argument is, in essence, a contradictory argument to the first one about the proliferation of frivolous suits. It, by definition, is a concession that virtually any suit is meritorious and non-frivolous under current tort rules. This argument is tantamount to a concession that there is no such thing as a non-meritorious suit under present practice, a concession which virtually destroys the first attack made on the contingency fee system.

The charge that "the risk is gone" from plaintiff's personal injury litigation is not substantiated by the evidence. Statistics in many communities, including the one in which I practice, demonstrate that defendants still win a large percentage of the time and when plaintiff's do win the average recovery is still small. Defendants' rates of victory are particularly high in certain types of cases, such as medical malpractice. The risk of losing still is present in all cases except those of clear liability, and even in those situations there is a risk remaining of an adverse verdict on the issue of extent of damages. Further, even in cases of "clear" liability a defendant still has the right to vigorously contest the case and run up substantial legal expenses on both sides in order to wear down a plaintiff's settlement demand. To charge that plaintiff's attorneys are unjustly enriching themselves through the contingency fee in an age of almost universal lay-down large verdicts is to make a charge that is not supported either by statistical evidence or by practical experience.

Further, even if such a charge were true, elimination of such fees on the basis that there

[1] M. Radin, *Contingency Fees in California*, 28 Cal. L. Rev. 587, 598 (1940).

[2] See, e.g., TEX. RULES OF CIV. PROC. 215.

[3] See, e.g., FED. RULES OF CIV. PROC. 11; TEX. BUS. & COM. CODE Section 7.50(o).

is no longer any risk in plaintiffs practice is singularly inappropriate as part of a legislative package which includes, generally, proposals designed almost exclusively to put the risk back in plaintiff's practice. If the charge that the plaintiffs' bar is not earning its money were true, tort reform proposals in other areas (such as that proposed in Congress to shift products liability litigation back to a negligence standard) could take care of the problems without requiring interference with the contingent fee. The supposed problem therefore can be eliminated, to the extent that it exists, by other measures without incurring the societal costs of denial of access to the courts which are attendant upon elimination or draconian reduction in the contingency fee relationship.

Since the contingent fee by definition is but a percentage of the total amount paid to the plaintiff, modification of the percentages taken by the attorney from that total amount will not affect in any way the total claims dollars paid by the insurer, which is the statistic which ultimately leads the insurer to raise its premiums. To the extent that the contingency fee affects insurance rates at all, it does so indirectly by inducing the plaintiff and his attorney to seek larger amounts of money. To actually *recover* those larger amounts, however, the plaintiff must still receive the agreement either of a jury or, in the case of settlement, the defendant and its insurer.

Unjust Enrichment

The final major complaint made against the contingency fee system is related to the second. It is that the contingency fee unjustly enriches the lawyer at the expense of the injured client. This argument purports to say that "we want to decrease or eliminate contingency fees because we want the plaintiff to be more adequately compensated by his damage award". This argument is made in conjunction with other proposals which are designed to strip away or limit the plaintiff's right of recovery. A system which eliminates the contingency fees which a client has to pay on the one hand but severely restricts his recovery on the other is not likely to lead to a greater net recovery by that injured party. The concern for the injured party often expressed by proponents of the elimination of contingency fee therefore is but a mask for the real purpose of this argument, which is to reduce total costs to the insurance carrier at the expense of the plaintiff's *attorney* and his client.

The specious argument behind a system of reduced damage recoveries and reduced contingency fees is that burdens on the defendant and his insurer can be relieved at the expense of the plaintiff's bar without altering one way or the other the net recovery to the plaintiff. The argument goes that the plaintiff is in the same position if he recovers $1.5 million and pays his attorney a $500,000 contingency fee than if he recovers only $1.1 million but pays his attorney only $100,000 as a contingency fee. The defendant in the second case has been substantially aided because he has had to pay less for his egregious conduct, and the only person harmed is the plaintiffs' attorney.

Such an argument, of course, assumes that the plaintiff can get the same benefits by paying less in attorneys' fees. Such an assumption is but a restatement of the argument that "the risk is gone" in plaintiffs' practice. This argument also rests on the assumption that reduction or elimination in contingency fees will have no effect on the availability and competence of legal services available to the plaintiff. The assumption is that an injured plaintiff can obtain the same competent representation on a wide scale for five percent of a statutorily limited recovery (or for an hourly fee) than he can for one-third of an uncapped recovery. The economics of modern law practice make this assumption untenable.

Even when chances of recovery are good, a plaintiff in a modern products liability or medical malpractice case may well have to absorb litigation costs and expenses unrelated to attorneys' fees which run up into the hundreds of thousands of dollars. The overwhelming majority of personal injury plaintiffs cannot afford to absorb such costs, and very few lawyers are going to be willing to handle, and are actually ethically prohibited from handling, a case which requires such expenditures on a non-contingency basis. Even when drastically restricted contingency fees are available, attorneys would hesitate in taking a case requiring substantial expenditures when the fees for handling the case are going to be minimal and dependent on success of the litigation and he might be exposing his client to a huge liability for expenses that client can't handle.

DATE 2-9-87
H.B. # 522

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Comment

Attorneys who remain in the plaintiff arena will be less likely to do the proper preparation necessary to obtain a large recovery for a client in an important tort case. The result of this will be a substantial reduction in the plaintiff's ability to recover, even on a meritorious claim, and in many cases will mean that person with meritorious claims will not even bring them to the courthouse because they lack the economic resources to litigate those claims to a conclusion.

One of the cruelest factors behind the proposed elimination of the contingency fee is that it will accentuate differences in wealth between the parties. An individual plaintiff who is injured in an automobile collision and attempts to sue General Motors starts out at a serious disadvantage in terms of available financial, personal, and technical resources. Current contingency fee systems enable a plaintiff to overcome that disadvantage by allowing him to offer to an attorney who does have such resources sufficient compensation to encourage the attorney to loan those resources to the plaintiff for the duration of the suit. By eliminating contingency fees, a plaintiff of limited means is given no way to overcome this disparity in resources because he is in effect told that he can pay for attorney's representation only what he can afford. Indeed, the proposals to eliminate the contingency fee would only increase the disparity in resources between the plaintiff and General Motors, because the plaintiff is effectively being limited in what he can pay to this attorney while no such limits whatsoever are placed upon General Motors' payments for its defense costs.

It may be contended that this type of analysis is unduly callous, a result of a business view of the law practice rather than a professional one, or the product of self interest. Such charges, however, may well depend upon whose ox is being gored. The plaintiffs' bar, just like the defense bar, the insurance industry, or the physicians, is entitled to protect its own economic survival, an economic survival that in the long run will also benefit the client through the increased availability of competent legal representation.

Those who decry the rights of the "poor injured plaintiffs" versus his attorney also have vestiges of self interest about those claims. The example of the Florida Tort Reform Act is instructive on this point. Having argued that tort reform was necessary because of the crisis in the availability and affordability of liability insurance, liability insurers have recoiled in horror when Florida, while passing such a tort reform bill, also rolled back liability insurance premiums by 40% as part of the same tort reform package. Such carriers have repeatedly denounced the roll back in their compensation as unconstitutional, have threatened to pull out of Florida entirely, and have published comments that they no longer view Florida as an attractive insurance market as they did prior to the rollback (presumably during the days of "liability crisis").[4]

[4] *The Wall Street Journal*, August 1, 1986; *The New York Times*, June 10, 1986; "Florida Insurers Incensed at Rate Cuts" by Susan Postlewaite (UPI, June 23, 1986).

Defense attorneys and physicians might well consider how selfless they would be if legislation were introduced to regulate their compensation from the tort system. Very few defense firms in this country could afford to handle tort or insurance defense matters if they were statutorily limited in their compensation for handling such matters to a flat fee or an hourly rate which is approximately one-third of their current rates. Physicians might well consider their reaction if similar legislation were introduced restricting their fees. Reduction of defense costs and health care costs would further make more economic sense in relieving a "liability insurance crisis" than elimination of the contingency fee, since such costs are paid directly by the insurance carrier and are major contributing factors to the escalation of premium payments in all types of insurance.

Parties who criticize the plaintiffs' bar for their defense of the contingency fee are seeking, without any similar sacrifice on their own part, to make plaintiffs' attorneys (and through them their clients) bear the sole burden of a tort reform scheme.

The cost of the proposed cure in terms of decreased availability of competent counsel and decreased access to the courts are, in the face of these policy justifications, worse than the problems they are designed to remedy.

This is particularly true when it is considered that no viable alternative exists to the contingency fee to assure adequacy of representation of injured plaintiffs.

The Real Issue

That leads to what is, in fact, the apparent real reason why restriction of contingency fees has been proposed. The real underlying purpose behind the attacks on the contingency fee under the tort reform rubric has been an effort to undermine those policies which the contingent fee system supports.

The attackers of the contingent fee do not want plaintiffs to have broad access to the courts. They do not want a widespread, competent, financially solvent plaintiffs' bar. They do not want plaintiffs to be in a position to economically compete with defendants for the best legal representation available. In short, under the guise of fixing the "problems" with the contingency fee system, the opponents of that system really desire to overthrow those policies which the contingent fee system was designed to support and which it has been supporting for the last century. By seeking to deny access to the courts and availability of legal services to all but the very wealthy, such persons seek to solve the liability insurance problem by driving plaintiffs, including those with meritorious claims, away from the courthouse door.

When claimants are required to foot the bill for their own litigation with no limits whatsoever on the defendant's ability to run up the expenses of litigation on the other side, such plaintiffs are deprived of their ability to litigate.

The exclusionary nature of the proposed abolition of contingent fees raises serious constitutional questions under the federal and state constitutions, particularly those provisions guaranteeing right of trial by jury, access to the courts, and equal protection of the laws. Beyond that, such a policy of wholesale exclusion of civil litigants on the basis of wealth seriously interferes with the ordinary civil rights of such a citizen and contravenes the rules of public fairness upon which the tort system, whatever its faults may be, has traditionally been based.

Conclusion

Proponents of tort reform have some legitimate concerns and certainly no one wants a world where liability insurance is unavailable or unaffordable. Such concerns need to be addressed, although critics of the tort reform movement may rightly question whether a system which is designed to lead to more affordable insurance rates by regulating everyone except the insurance industry is an appropriate vehicle for addressing those concerns. Tort reform without insurance reform does not make sense. ■■■■

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. H.B 522 DATE Feb 9, 1987

SPONSOR ASAY

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Pat Melby	State Bar		✓
Bob Conea	Boz. Chamber	✓	
Gerald J Neely	Mont. Trial Lawyers Assn.	✓	
Sue Weingartner	MT Association of Defense Counsel		✓
Bonnie Tippett	MT Defense Trial Lawyers	✓	
C L Oliphant	Oliphant Law Firm		✓
Jim Robischon	Wood Lobby Coalition	✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33

EXHIBIT A
DATE 2-9-87
HB ~~#~~ 344

MEDICAL MALPRACTICE STATUTE OF LIMITATIONS

A. SUMMARY OF POSITION - House Bill 344

The major concern of Montana physicians with respect to House Bill 344 is that the legislature deal with the matter of the statute of limitations for minors, by reducing the limitation period.

Current law provides for the statute of limitations of minors to run after 19 years. Senate Bill 160 changes that to as much as 23 years. House Bill 344 provides for a shorter limitation period for minors.

B. POLICY REASONS FOR LEGISLATIVE PROPOSAL

The general objectives of the legislation are to:

- Requiring the bringing of a legal action on behalf of minors who are injured, while the evidence is still fresh;

- Decreasing the necessity of large reserves by insurance companies, because of uncertainty as to when legal actions might be brought involving minors of tender years, thus stabilizing the insurance rates for the affected professionals;

C. SCIENTIFIC EVIDENCE OF LINK WITH DOWNWARD IMPACT ON PREMIUMS

One prerequisite to insurability is the ability to measure with certainty the time, place, and amount of harm. One basis of insurance is the theory that a combination and spreading of similar risks will render the probable loss from the risks predictable. A rate of premium payments to cover the risks can then be determined.

If a hazard cannot be calculated, a carrier must charge unusually high premiums to accumulate abundant reserves for guaranteed protection. Such is the case with respect to injury to minors, where the length of time before the carrier knows whether its exposure is present can be upwards of 19 - 25 years.

This type of legislation - shortening the statute of limitations for minors - has been shown to have a stabilizing effect on prices and thus a reduction of the uncertainty with which actuaries must deal:

> "*** changes in the statute of limitations, especially those which limit the time for suits on behalf of minors and other legally disabled persons, will have a significant stabilizing effect on prices, since they will reduce the uncertainty with which actuaries must deal, and should therefore improve actuaries'

EXHIBIT A
DATE 2-9-87
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predictions," 1977 Report Of The Commission on Medical Professional Liability. 1977 American Bar Assocation, pp. 58, note 55.

Other studies have shown a statistically-significant effect on pricing of insurance from reductions in the statute of limitations. Adams, E. Kathleen and Zuckerman, Stephen, "Variation in the Growth and Incidence of Medical Malpractice Claims," Journal of Health Politics, Policy and Law, Vol. 9, No. 3, Fall 1984, pp. 475-488.

D. CONSTITUTIONALITY OF LEGISLATION

A. LEGISLATION IN EFFECT. Twenty-one states have adopted special statute of limitation rules for minors.

Several states have amended their statutes of limitations in medical injury cases where minors are involved, typically by providing that the statute applies to a minor upon reaching a certain age.

In Indiana -- for example -- the statute of limitations for medical malpractice against physicians is 2 years, except that in the case of minors injured at birth, it extends to age eight. In Texas, the law allows minors under 12 until their 14th birthday to file. Louisiana and Utah provide that there is no special treatment for minors, so that minors are subject to the same statutory limitation period as applies to adults.

B. GENERAL CONSTITUTIONALITY. States which do not view the common law action for negligence as a "fundamental right" have considered statutes of limitation and repose that bar minors' claims and have regularly found that such statutes do not offend guarantees of due process or equal protection. See, e.g. Johns v Wynnewood School Board of Education, 656 P.2d 248, 249 (Okl. 1982); Licano v Krausnick, 663 P.2d 1066, 1068 (Colo. App. 1983).

The states of Alabama, Indiana, and Utah have also upheld such limitations.

The result is often different for states which have open court provisions, especially if a "strict scrutiny" analysis is applied, as was the case in Montana prior to the passage of Initiative 30. See: Barrio v San Manuel Div Hosp., Magma Copper, 692 P.2d 280 (Ariz. 1984)(a statute which requires minors injured when below the age of seven to a bring negligence action against a health care provider by the time she reaches the age of ten violates the fundamental constitutional right to bring a cause of action for negligence.)

Because of the passage of Initiative 30, the proposed version would pose even less of a constitutional problem than those states which bar minors' claims.

Prepared by the Montana Medical Association, 2021-11th Ave., Helena, Montana 59601, G. Brian Zins, Executive Director, 406-443-4000.

B
2-9-87
HB 344

THE HEALTH CARE CRISIS IN MONTANA:

Montana Physicians Speak Out

THE HARM TO THE MONTANA PUBLIC FROM A FAILURE TO ACT ON TORT REFORM

January, 1987

G. Brian Zins, Executive Director
Montana Medical Association
2021-11th Avenue
Helena, Montana 59601

Exhibit

B
2-9-87
#344

THE HARM TO THE MONTANA PUBLIC FROM A FAILURE TO ACT ON TORT REFORM

1. SUMMARY OF SURVEY RESULTS

In December, 1985 the Montana Medical Association sent a written opinion survey to Montana physicians concerning their beliefs and feelings concerning the problems of the cost and availability of insurance. [1]

Because of large premium increases and the fear of unjustified lawsuits within the last few years, 82% of Montana physicians have taken actions in limiting their practices -- and other steps -- which have reduced the availability of medical services in Montana and otherwise altered the medical field.

If premiums substantially increase over the next two or three years, 92% of Montana physicians intend to take further steps in the same direction:

Montana Physician Opinion

Specific Past And Future Alterations Of Practice

	Past Alteration	Future Alteration
Reduced Level of Insurance	6.1%	9.4%
Cancel Insurance	2.5%	2.6%
Referred More Cases	40.2%	30.6%
Increased Fees	41.9%	66.7%
Avoid high risk procedures	43.0%	43.8%
Order extra lab tests, x-rays, or other diagnostic procedures	63.1%	41.5%
Cease seeing emerg room patients	4.0%	11.4%
Cease seeing first time patients	1.1%	3.3%
Early retirement	7.7%	24.1%
Move to larger community	1.1%	5.0%
Other Methods Of Alteration	11.3%	12.9%

Since that survey was taken, premiums have continued to escalate.

[1] The Association received responses from 726 of the 1151 (63%) physicia active in the practice of medicine by the cutoff date for tabulation of the survey results.

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2-9-87
344

February 9, 1987

House Judiciary Committee
Montana Legislature

Re: House Bill 344

Dear Chairman and Committee Members:

On behalf of the Montana Dental Association and the over 450 dentists practicing in Montana, I support HB 344. Enactment of this revision to the medical malpractice statute of limitations should improve the tort law of Montana. By encouraging earlier filings of potential claims, dentists can expect their insurers to deal with a somewhat more predictable future.

It has been observed that dental malpractice actions are often filed a number of years after the alleged negligent treatment. A reference work for plaintiffs' attorneys, Handling Dental Cases by Norman L. Shafler (1983), states that patients often wait a long period of time before contacting an attorney. Shafler gives several reasons, such as the patient's procrastination, the dentist's assurance that the patient will get used to a new appliance or treatment, or the referral of the patient's complaint to a local peer review committee. (Shafler, op. cit., §3.40).

Whatever the reasons, these delays in pursuing remedies contribute to a slow settlement of all the potential malpractice claims which can arise out of a year of dental practice. The table shows how in the fifth development year 19% of all asserted claims are paid out and not until the fifth year are half the asserted claims paid out. It takes 14 years to completely close out a development year -- in other words, the last claim for negligent dentistry practiced in 1986 will be paid out in 2000.

DENTISTS' PROFESSIONAL LIABILITY
PAY-OUT PATTERN
AS OF ACCIDENT YEAR 6/30/85

Development Year	Percent of Ultimate Paid Out	Cummulative Effect (%)
1st	1.0	1.0
2nd	6.0	7.0
3rd	11.0	18.0
4th	18.0	36.0
5th	19.0	55.0
6th	14.0	69.0
7th	11.0	80.0
8th	7.0	87.0
9th	7.0	94.0
10th	3.0	97.0
11th	1.0	98.0
12th	1.0	99.0
13th	.5	99.5
14th	.5	100.0
TOTAL	100.0	100.0

The pedodontists, practitioners of children's dentistry, have an especially long tail on their potential liability under current law. A 12-year old who doesn't like his braces could conceivably wait until the day he turns 23 and sue the dentist. HB 344 should restore some balance in this area.

Exhibit

NAME: Jim Robischon DATE: 2-9-87

ADDRESS: Helena, MT

PHONE:

REPRESENTING WHOM? Montana Liability Coalition

APPEARING ON WHICH PROPOSAL: HB 344

DO YOU: SUPPORT? ✓ AMEND? OPPOSE?

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

VISITORS' REGISTER

Judiciary COMMITTEE

BILL NO. 344 DATE Feb. 9, 1987

SPONSOR

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
CHADWICK A. SMITH	MONT HOSP ASS'N	✓	
Robert H Likewise	Mont. State Pharm. Assn	✓	
Jeffrey H Strickler MD	Am Academy of Pediatrics	✓	
Gene J. Neely	Mont. med. Assoc.	✓	
Bob Corex	Bozy. Chamber of Comm	✓	
~~Carter Lamm~~	~~Mt Arts Council~~		
Roger Tippy, Helena	Mont Dental Assoc	✓	
Tim Robischon	Mont. Lieb. Coalition	✓	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

CS-33