MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 10, 1987

The thirty-ninth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on March 10, 1987 by Vice Chairman Bruce Crippen in Room 325 of the Capitol Building.

ROLL CALL: All member were present.

CONSIDERATION OF HB 664: Representative Jack Ramirez of Billings presented HB 664 to the committee (see Exhibit 1). He said it will clean up the joint and serverally liabile part of SB 51.

PROPONENTS: None

OPPONENTS: None

DISCUSSION ON HB 664: None

CONSIDERATION OF HB 241: Representative Gary Spaeth of House District #84 introduced HB 241 to the committee (see Exhibit 2). He talked about the Gates case that happen five years ago, which woke everyone up to the reality of wrongful discharge. He said one of his main concerns is to decrease the number of wrongful discharge cases that are going into the courtroom today. He said the wrongful discharge crisis has had a great impact on business coming into the state, the businesses will not come in because of the state's high case load of wrongful discharge suits. He explained that many cases are won by the employer, but the cost of the litigation is what costs the businesses the most and the time spent on defending the business in one of these cases. He said the employers of Montana have no set guidelines to follow when getting rid of employee that needs to be discharged, so the employer will not end up in a wrongful discharge suit. He said there is nothing in statute that can define an "adequate job done". He said some employers would rather keep a bad worker than take the risk of getting sued by that worker. Representative Spaeth presented some amendments to the committee, which Barry Hjort addressed.

PROPONENTS: Barry Hjort, Montana Defense Counsel, gave the committee a summary on wrongful discharge cases in the state (see Exhibit 3). He also gave the committee the Spaeth amendments (see Exhibit 4). He explained that an employer could spend between $5,000 and $75,000 defending himself in a wrongful discharge case. He explained each case in his summary. He said right now a person can take his employer to court for wrongful discharge, win the case, get up to three years of present value

future wages, and be free the next day to seek employment elsewhere. He left with the committee a statement of intent that he prepared for the bill dealing with section five of HB 241 (see Exhibit 5).

Kay Foster, Chamber of Commerce in Billings, gave the committee a pamphlet called ISSUES "87 (see Exhibit 6). She supported the bill.

John Deomenech, Skyland Scientific in Belgrade Montana, said much of the Northeast part of the nation depends on his company for pharmaceutical needs. He said that when he arrived at the company in 1979 he saw that the company was losing around 1 million dollars a year, so to insure that the 44 employees that work at the company would have a job, the company would have to make some changes. He said on Christmas Eve one of the employees handed him a 6 million dollar law suit. He said the company does around a couple of millon dollars of revenue a year. He felt this action by this employee was nothing more than harassment. He stated that he supported the bill for the sake of small business.

Lloyd Andrews, Skyland Scientific Chairman of the Board, explained how his people came and rescued the company with money from England and St. Louis. He said the people that own the company would like to move the company out of Montana, but he said he would like to stay in Montana. He said they want to move because they fear bankruptcy and especially with a 6 million dollar suit coming from an employee, it would seem logical to leave. He said the bill will keep business in Montana.

Chip Erdmann, Montana Savings and Loans, said the bill will provide reasonable guides for both sides.

Bob Pyfer, Montana Credit Unions League, said the way the system is now if makes an employer want to have a lawyer by his side every time he says anything or takes a step toward an employee.

Sue Wiengartner, Montana Health Care Association, supported the bill (see Exhibit 7).

Jim Robischon, Montana Liability Coalition, state that his group supports the bill.

Bill Leary, Montana Hospital Association, also supported the bill.

Irv Dellinger, MBMDA AND MHBA, supported HB 241.

Tom Richardson, Town Pump Food Stores, explained that just yesterday the Town Pump Company was issued a law suit from one of its employees that worked for them in 1985. He said it will cost Town Pump at least $5,000 to go to court to defend this. He pointed out that no employer enjoys

firing anyone, but sometimes it must be done. He said the employers need guidelines desperately to work with to protect themselves from this kind of suit. He commented that he would recommend to any employer to go see a lawyer before firing anyone.

Bruce MacKenzie, D.A. Davidson and Company, testified in support of the bill.

OPPONENTS: Mike Meloy, representing himself, explained that this issue is not a new issue, but the state has not touched it since five years ago with the Gates case. He said that case and jury instruction from ten years ago also had guidelines for employers to follow when dealing with this. He pointed out that he felt there was nothing in this bill that will prevent frivolous law suits. He handed out amendments to the bill with a rationale sheet to go along with the amendments (see Exhibit 8 and 9). He explained that amendments came from both plaintiff and defendant attorneys. He said the amendments give true just cause for firing someone. He said a person that has worked in the same place for over 20 years and is older, and now gets fired needs more from this bill to protect his rights. He felt the amendments will bring the bill back to the middle so all can have some benefit from it in a fair way.

Don Robinson, attorney at law and a member of the Ad Hoc committee that presented the amendments that Mike Meloy handed out, said that the part of the bill addressing the three year limitation where one has to be employed for three years at the same work place before that person can bring a wrongful discharge suit against an employer, he did not agree with. He brought an editorial from the Bozeman paper which gives a graphic view of how some people feel this provision in the bill is unfair (see Exhibit 10). He said he has seen bona fide cases of wrongful discharge before and he feels that employee needs the present law and not this bill. He said if the bill's main goal is to get rid of frivolous cases, then in all tort cases the standards should be raised to stop that. He said an employment policy should alway be in writing, because that will probably save a lot of time and money. He felt HB 241 damages the right of employer to make a good written policy available to his employees. He hoped the committee would look closely at what they might be opening up in this area. (Exhibit 9A)

Alan Brown, Consulting Service, stated that he was a member of the Ad Hoc committee that created amendments for the bill, which were presented by Mike Meloy. He felt employers will tear up their written personnel policies if this bill passes because the bill has eased the burden on the employer to be fair to the employee.

Stephen Pohl, attorney at law, said a good wrongful discharge suit would be if an employer was hurt and was on a leave of absence and came back and found that the employer hired someone else. He felt the bill was

unfair to the people that have worked under three years at a workplace because there could be some very good reasons to bring a wrongful discharge suit against an employer.

Jackie Amsden, Womens' Lobbyist Fund, opposed the bill (see Exhibit 11).

Jack Lych of Great Falls stated that he opposed the bill also (see witness sheet).

DISCUSSION ON HB 241: Senator Pinsoneault asked Mr. Robinson how many times he has used Rule 11, which sanction lawyer in their conduct with cases. Mr. Robinson said he did not know of any cases in Montana. Senator Pinsoneault asked if there is a real need to be so concern about frivolous law suits. Mr. Robinson felt there is a great need to weed out these kind of cases because they are there.

Senator Crippen questioned Mr. Hjort about the Meloy amendments about a written personnel policy. Mr. Hjort replied that the bill right now might make some employers tear up their policies.

Senator Mazurek asked Mr. Hjort what he thought of all the Meloy amendments (Ad Hoc). Mr. Hjort said that some of the amendments are fine and other are not and if the committee put enough of the one we don't care for in the bill, the Defense Counsel would rather the committee kill the bill.

Senator Beck asked if this bill will open up a door to constructive discharge and have farmers and construction employers having to change alot their policies so they comply to this bill. Representative Spaeth said he did not know how far this bill could go and the only way to find out is to try it out.

Senator Mazurek asked if the Ad Hoc committee was a good mixture of both sides of the courtroom. Mr. Meloy said it was and it was worked on by both sides. Senator Mazurek question if the Ad Hoc amendments were the best for the employer as they possibly could be. Mr. Robinson said the amendments were a compromise.

Representative Spaeth closed on the bill by saying the bill will definitely help the business climate in Montana.

The committee adjourned at 12:15 p.m.

Dwight P. Ramirez
Chairman

DATE March 10

COMMITTEE ON Judiciary

VISITORS' REGISTER HB 241

NAME	REPRESENTING	BILL #	Check One: Support	Oppose
Bob Correa	Bozo. Chamber of Comm	241	✓	
John DOMENECHT	Skyland Scientific	241	✓	
Lloyd J. Andrews	" "	241	✓	
John F. LYNCH	Montana Employees Assn.	241		✓
Ron Cohn	Whitefish Rep/Kalispell	241	✓	
Chip ERDMANN	MT Savings & Loans	241	✓	
Ted Rollins	ASARCO, INC.	241	✓	
Kay Foster	Billings Chamber Gov. Council on Ec. Dev.	241	✓	
Donald C. Robinson	Poore, Roth & Robinson, P.C.	241		✓
Alan O. Brown	Consulting Services	241		✓
Stephen C. Pohl	Attorney	241		✓
Bob Pyfer	Mont. Credit Unions League	24	✓	
Sue Weingartner	MT Health Care Assn	241	✓	
	MT Solid Waste Contractors	241	✓	
	MT Assn Def Counsel	241	✓	
Bryan M Enderle	Missoula Chamber of Commerce	241	✓	
Bill Leary	MT. Hosp. Assn	241	✓	
Dan Gallagher	MBMDA + MABA	241	✓	
Mike Meloy	SWP	241		✓
Tom Gallagher	Town Pump	241	✓	
Bruce A MacKenzie	D.A. Davidson & Co	241	✓	
Don Allen	MT. Wood Products Assn.	241	✓	
Bruce W. Moerer	MSBA	241	✓	
Mary Hansen	Self	241	✓	
Julia Hilliard	Butte	241	✓	
Jackie Ansden	Women's lobbyist Fund	241		✓

(Please leave prepared statement with Secretary)

SENATE JUDICIARY
EXHIBIT NO. 1
DATE March 10, 1987
BILL NO. HB664

SUMMARY OF HB664 (RAMIREZ)
(Prepared by Senate Judiciary Committee staff)

HB664 contigently amends several statutes that deal with joint obligations and debts to reflect changes in civil joint and several liability statutes. The bill contains a coordination provision that provides that the bill will not be effective unless any bill revising joint and several liability also passes and becomes effective.

COMMENTS: This bill just "makes sure" that a person who is severally liable only in a civil law suit cannot be held jointly liable under any other contractual or statutory theory.

C:\LANE\WP\SUMHB664.

SENATE JUDICIARY
EXHIBIT NO. 2
DATE March 10, 198
BILL NO. HB 241

SUMMARY OF HB241 (SPAETH)
(Prepared by Senate Judiciary Committee staff)

HB241 amends the law relating to wrongful discharge and the civil remedies available for wrongful discharge. In recent years, several large judgments have been awarded to successful Montana plaintiffs in wrongful discharge cases. This bill is an attempt to prevent such large awards; and, would eliminate most such actions all together. At common law, and statutorily (39-2-503), employment is considered at-will; that is, either party can terminate the employment at any time for any reason, without penalty. There are three exceptions that have been developed by the courts that limit at-will employment and it is under these three exceptions that large wrongful discharge judgments have been awarded. These three exceptions are:

1) when the discharge constitutes a violation of public policy;
2) when the discharge violates an implied or express provison of the employment contract promising job security; and
3) when the discharge violates the implied covenant of good faith and fair dealing.

This bill would eliminate the third theory of recovery and restrict recovery under the first two theories (as originally drafted, the bill would have eliminated the second theory of recovery as well). Under this bill, a person could recover for a wrongful discharge only if:

1) the discharge was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; or
2) the employee was employed by the employer for at least 1,000 hours a year for 3 consecutive years immediately preceding the discharge and the discharge was not for good cause; or
3) the employer violated the express provisions of its own written personnel policy (a House amendment). [Section 4, pages 3 and 4.]

Under this bill, recovery would be liminted to lost wages and fringe benefits, plus interest, for 3 years less any amount the employee could have earned with reasonable diligence. Recovery for the following is specifically prohibited: pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages not specifically allowed. [Section 5, page 4.] It is these kinds of damages that generally result in large settlements.

The bill allows binding arbitration if the parties agree and recovery is limited to the provisions of the bill.

All other kinds of common law remedies for wrongful discharge are eliminated, except discharges subject to state or federal statute, a written collective bargainig agreement, a written contract of employment for a specific term, or final and binding arbitration. [Section 7, pages 5 and 6.] The bill

(over)

specifically prohibits actions for wrongful discharge based on the following: public policy; implied covenant of good faith and fair dealing; intentional or negligent interference with contractual rights, prospective or otherwise; intentional or negligent infliction of emotional distress; breach of fiduciary duty; negligent or intentional misrepresentation or negligence; [the House took out fraud; defamation; and loss of consortium]. [Section 8, pages 6 and 7.]

COMMENTS: The purpose clause [Section 1 of the bill], almost restates the Employment At-Will statute, 39-2-503 (attached). But the language is not identical, it seems like the employment at-will statute should either be repealed or amended into the bill, which would require an amendment of the purpose clause, too.

The capped and undelined language on page 6, lines 1 and 2 was added by the House on the advice of the Human Rights Division to "track" the state's discrimination statutes. However, the House deleted "COLOR" on line 1 and this word does appear in the discrimination in employment statutes.

C:\LANE\WP\SUMHB241.

* **39-2-504. Termination by employer for fault.** An employment, even for a specified term, may be terminated at any time by the employer in case of any willful breach of duty by the employee in the course of his employment or in case of his habitual neglect of his duty or continued incapacity to perform it.

History: En. Sec. 2704, Civ. C. 1895; re-en. Sec. 5275, Rev. C. 1907; re-en. Sec. 7790, R.C.M. 1921; Cal. Civ. C. Sec. 2000; Field Civ. C. Sec. 1030; re-en. Sec. 7790, R.C.M. 1935; R.C.M. 1947, 41-305.

Cross-References
"Employment" defined, 39-2-101.

* **39-2-505. Termination by employee for fault.** An employment, even for a specified term, may be terminated by the employee at any time in case of any willful or permanent breach of the obligations of his employer to him as an employee.

History: En. Sec. 2705, Civ. C. 1895; re-en. Sec. 5276, Rev. C. 1907; re-en. Sec. 7791, R.C.M. 1921; Cal. Civ. C. Sec. 2001; Based on Field Civ. C. Sec. 1031; re-en. Sec. 7791, R.C.M. 1935; R.C.M. 1947, 41-306.

Cross-References
"Employment" defined, 39-2-101.

* Repealed by HB 241

SENATE JUDICIARY
EXHIBIT NO. 2
DATE 3-10-87
BILL NO. H.B. 241

Part 6
Master and Servant

39-2-601. Servant defined. A servant is one who is employed to render personal service to his employer otherwise than in the pursuit of an independent calling and who in such service remains entirely under the control and direction of the latter, who is called his master.

History: En. Sec. 2720, Civ. C. 1895; re-en. Sec. 5279, Rev. C. 1907; re-en. Sec. 7794, R.C.M. 1921; Cal. Civ. C. Sec. 2009; Field Civ. C. Sec. 1034; re-en. Sec. 7794, R.C.M. 1395; R.C.M. 1947, 41-401.

39-2-602. Term of hiring. (1) A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages. A hiring at a yearly rate is presumed to be for 1 year; a hiring at a daily rate, for 1 day; a hiring by piecework, for no specified term.

(2) In the absence of any agreement or custom as to the term of service, the time of payment, or rate or value of wages, a servant is presumed to be hired by the month at a monthly rate of reasonable wages, to be paid when the service is performed.

History: (1)En. Sec. 2721, Civ. C. 1895; re-en. Sec. 5280, Rev. C. 1907; re-en. Sec. 7795, R.C.M. 1921; Cal. Civ. C. Sec. 2010; Field Civ. C. Sec. 1035; re-en. Sec. 7795, R.C.M. 1935; Sec. 41-402, R.C.M. 1947; (2)En. Sec. 2722, Civ. C. 1895; re-en. Sec. 5281, Rev. C. 1907; re-en. Sec. 7796, R.C.M. 1921; Cal. Civ. C. Sec. 2011; Based on Field Civ. C. Sec. 1036; re-en. Sec. 7796, R.C.M. 1935; Sec. 41-403, R.C.M. 1947; R.C.M. 1947, 41-402, 41-403.

Cross-References
"Servant" defined, 39-2-601.

39-2-603. Renewal of hiring. Where, after the expiration of an agreement respecting the wages and the term of service, the parties continue the

39-2-411. Surviving employee. Where service is to be rendered by two or more persons jointly and one of them dies, the survivor must act alone if the service to be rendered is such as he can rightly perform without the aid of the deceased person, but not otherwise.

History: En. Sec. 2686, Civ. C. 1895; re-en. Sec. 5269, Rev. C. 1907; re-en. Sec. 7784, R.C.M. 1921; Cal. Civ. C. Sec. 1991; Field Civ. C. Sec. 1024; re-en. Sec. 7784, R.C.M. 1935; R.C.M. 1947, 41-217.

Part 5
Termination of Employment

39-2-501. Termination of employment generally. Every employment is terminated by:

(1) the expiration of its appointed term;
(2) the extinction of its subject;
(3) the death of the employee; or
(4) his legal incapacity to act as such.

History: En. Sec. 2701, Civ. C. 1895; re-en. Sec. 5272, Rev. C. 1907; re-en. Sec. 7787, R.C.M. 1921; Cal. Civ. C. Sec. 1997; Field Civ. C. Sec. 1027; re-en. Sec. 7787, R.C.M. 1935; R.C.M. 1947, 41-302.

Cross-References
"Employment" defined, 39-2-101.

39-2-502. Termination by death or incapacity of employer. (1) Every employment in which the power of the employee is not coupled with an interest in its subject is terminated by notice to him of:

(a) the death of the employer; or
(b) his legal incapacity to contract.

(2) An employee, unless the term of his service has expired or unless he has a right to discontinue it at any time without notice, must continue his service after notice of the death or incapacity of his employer, so far as is necessary to protect from serious injury the interests of the employer's successor in interest, until a reasonable time after notice of the facts has been communicated to such successor. The successor must compensate the employee for such service according to the terms of the contract of employment.

History: (1)En. Sec. 2700, Civ. C. 1895; re-en. Sec. 5271, Rev. C. 1907; re-en. Sec. 7786, R.C.M. 1921; Cal. Civ. C. Sec. 1996; Field Civ. C. Sec. 1026; re-en. Sec. 7786, R.C.M. 1935; Sec. 41-301, R.C.M. 1947; (2)En. Sec. 2702, Civ. C. 1895; re-en. Sec. 5273, Rev. C. 1907; re-en. Sec. 7788, R.C.M. 1921; Cal. Civ. C. Sec. 1998; Field Civ. C. Sec. 1028; re-en. Sec. 7788, R.C.M. 1935; Sec. 41-303, R.C.M. 1947; R.C.M. 1947, 41-301, 41-303.

Cross-References
"Employment" defined, 39-2-101.

39-2-503. Termination at will. An employment having no specified term may be terminated at the will of either party on notice to the other, except where otherwise provided by this chapter, 28-10-301 through 28-10-303, 28-10-502, 30-11-601 through 30-11-605, and 39-2-302.

History: En. Sec. 2703, Civ. C. 1895; re-en. Sec. 5274, Rev. C. 1907; re-en. Sec. 7789, R.C.M. 1921; Cal. Civ. C. Sec. 1999; Field Civ. C. Sec. 1029; re-en. Sec. 7789, R.C.M. 1935; amd. Sec. 2, Ch. 245, L. 1969; R.C.M. 1947, 41-304; amd. Sec. 4, Ch. 397, L. 1979.

Cross-References
"Employment" defined, 39-2-101.

WRONGFUL DISCHARGE

Why is legislation concerning wrongful discharge necessary? What are the arguments that support a statutory alternative to judicial interpretations that currently make up the law of wrongful termination?

1. Historically, the employment relationship in the United States has been "at-will." The employer and the employee both had the right to terminate the relationship for "...a good reason, a bad reason, or no reason at all." This rule is codified in Section 39-2-503, MCA. Several statutory exceptions to the rule have been adopted in Montana that apply to specific circumstances: (a) no discharge because of attachment or garnishment of wages - 39-2-302; (2) nurses and other health care professionals have the right to participate in sterilization or abortion procedures without jeopardizing job security - 50-5-503; 50-20-111; and (c) employers are prohibited from terminating employees for forbidden discriminatory reasons - 49-1-101, et seq. In 1982, with the decision of Gates v. Life of Montana Insurance Co., 196 Mont. 178, 638 P.2d 1063, the Montana Supreme Court rendered the first of several decisions concerning the employment relationship which have created exceptions of such magnitude that the exceptions have, for all practical purposes, swallowed the "at will" rule.

2. In Gates I, the Supreme Court held that there was a covenant of good faith and fair dealing implied in every employment contract. If an employer adopted policies applicable to its employees and failed to follow the policies in connection with a termination, a breach of the implied covenant could occur. Next, in Nye v. Department of Livestock, 196 Mont. 222, 639 P.2d 498 (1982), the Court established the tort of wrongful discharge which applies in circumstances where the discharge is for reasons that violate public policy. In Gates II, 668 P.2d 215 (1983), the Court held that an employer's failure to follow its own handbook procedures was a breach of the implied covenant, and that such a breach "...is a tort for which punitive damages can be recovered if defendant's conduct is sufficiently culpable." Then, in Dare v. Montana Petroleum Marketing, 687 P.2d 1015 (1984), the Court extended the implied covenant to situations not involving a handbook or written policy violation, saying: "...implication of the covenant depends upon (the) existence of objective manifestations by the employer...(of) job security...." Next, in Crenshaw v. Bozeman Deaconess Hospital, 693 P.2d 487 (1984), the Court held that the duty of good faith and fair dealing established in Gates I would be extended to probationary employment relationships.

3. The difficulty with the current state of the law is that there are no standards upon which an employer can rely when contemplating the termination of an employee. Virtually any termination can be asserted to be in violation of the covenant of good faith and fair dealing, or in violation of public policy, or done in bad faith, or even negligent (Crenshaw), and the facts will be presented to a jury, with the employer's decision subject to being second-guessed. Termination cases are very expensive to defend (litigation costs can run from $25,000-75,000 per case) and there is frequently a question as to whether the employer's general liability policy provides coverage. The Washington Supreme Court recently held that the discharge of an employee is an intentional, not an accidental act, and that a general liability policy provides no coverage for lost earnings or emotional distress. E-Z Loader Boat Trailers v. The Travelers Indemnity Co., 106 Wn.2d 901 (1986).

4. The increasing number of wrongful termination cases at the district court level is an eye-opener. In Billings, in state and federal court, a total of 182 such cases were filed between 1981 and October, 1986. In Great Falls, 89 such cases were brought in the same time period. Helena's state and federal courts had 84 wrongful discharge cases from 1981 to October of 1986.

5. Wrongful discharge verdicts have been awarded for huge sums. The award in Flanigan v. Prudential Federal Savings, affirmed on appeal by the Montana Supreme Court, was in the amount of $94,170 for economic loss, $100,000 for emotional distress, and $1.3 million for punitive damages. In Farrens v. Meridian Oil, a Billings federal court jury awarded $2.5 million, no part of which was punitive damages.

6. Significant awards of lost future wages do not seem to make any sense. Discharged employees have been awarded lost future wages for the balance of their working lives. For example, the plaintiff in Farrens, a thirty-four year old engineer, sought and was awarded over two million dollars in lost earnings and earning capacity. A successful plaintiff in such a case is free, after the receipt of such an award, to seek and obtain other employment to supplement the windfall without any offset. Such a doctrine is particularly inappropriate when research indicates that 8-10% of all jobs in this country have been lost each year since 1969, and that every five years the economy must replenish about 50% of its available jobs. (David Birch - Inc. Magazine, April, 1985). In today's competitive and changing economy, jobs simply do not last for the duration of the typical person's work life.

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 3-10-87
BILL NO. H.B. 241

7. No fair minded person would disagree that certain protections must be afforded the employee. However, the protection of Montana's existing tort law provides much greater opportunity for recovery, and hence greater leverage in the employment relationship for the so-called "at-will" employee than for the employee whose job security is provided for under the terms of a collective bargaining contract. A typical collective bargaining contract will have a job security clause that requires termination only for "just cause." A terminated employee will usually have the right to challenge his termination through an established grievance procedure, culminating in arbitration before a neutral third party. If the arbitrator determines that the discharge was not for good cause, the remedy generally includes the payment to the employee of lost wages and benefits, and reinstatement to the former position. The so-called "at-will" employee, on the other hand, may recover damages for past and future wage loss, emotional distress, and in appropriate cases, punitive damages. The equation is badly out of balance. In Justice Morrison's dissent in Brinkman v. State of Montana, (Decided: December 11, 1986), he recognized this disparity:

> I believe the direction of the Court, perhaps unwittingly, is clear. Greater job security found through a tort remedy, is afforded to non union employees. They can recover noneconomic compensatory damages plus punitive damages while the union employee is left with the less effective grievance procedure. Organized labor has been dealt another serious blow by this decision.

8. The proposed bill accomplishes a number of objectives. It preserves the right to challenge a discharge in appropriate cases. "Whistleblowers" are protected, as are employees with five or more years of employment with the employer. Employers may terminate for cause which is defined as a legitimate business reason. A successful claimant can recover up to two years of lost wages. The arbitration alternative to litigation is encouraged. Arbitration is usually quicker and less expensive than litigation in the courts. Arbitration has a long and successful history in the context of resolving discharge disputes where employees and employers have a collective bargaining agreement. It is favored and encouraged by court decision. (See the U.S. Supreme Court's Steelworker's Trilogy). The bill brings some rational standards to an area of the law that currently has none.

SENATE JUDICIARY
EXHIBIT NO. 3
DATE 3-10-87
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SENATE JUDICIARY
EXHIBIT NO. 4
DATE March 10, 1987
BILL NO. HB 241

AMENDMENTS - HB 241
(THIRD READING COPY)
Representative Gary Spaeth

1. Page 1, line 23. After the word "employment.", delete the following sentence.

2. Page 2, line 13. After the word "and" delete "means the" and insert "any other".

3. Page 2, line 14. After the word "employment" delete "through an action other than retirement," and insert "including resignation,".

4. Page 2, line 15. After the word "work," insert "failure to recall or rehire and".

5. Page 2, line 17. After the word "reason," insert "." and strike "or resignation."

6. Page 2, line 22. Delete subsection (4), and renumber the following subsections accordingly.

7. Page 3, line 9. Delete lines 9, 10 and 11 and insert "a legitimate business reason."

8. Page 4, line 14. Add a new subsection (2) as follows:

   "(2). The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of Section 4(1).

   Renumber subsection (2) as subsection (3).

9. Page 4, line 19. After the word "(1)." insert "and (2)."

10. Page 5, line 20. Delete subsection (1) in its entirety and renumber following sections accordingly.

11. Page 6, line 15. After the word "for" delete "wrongful".

12. Page 6, line 17. After the word "contract" insert "." and delete the remainder of subsection (1) and all of subsection (2).

SENATE JUDICIARY
EXHIBIT NO. 4
DATE 3-10-87
BILL NO. H.B. 241

STATEMENT OF LEGISLATIVE INTENT CONCERNING THE DAMAGE LIMITATION CONTAINED IN SECTION (5) OF HB 241

* * * * *

HB 241 proposes to limit compensatory damages in wrongful discharge actions to three years of lost wages and fringe benefits, plus interest.

The three-year limitation was the product of compromise between the competing interests of the employer and the discharged employee. The limitation was found to be appropriate because of the large claims for future damages that have become the norm in wrongful discharge cases. These claims have routinely been made on the basis of the plaintiff-employee's work life expectancy to age 62 or longer, rather than the time it should reasonably take the employee to obtain substitute employment in the available labor market.

The large damage claims that have become customary in wrongful discharge cases pose an unreasonable threat to the viability of the employer's business, and the continued employment of the remaining employees.

Three years was selected as an appropriate limitation because it is a reasonable period of time for a discharged employee to become resituated in the labor market. In addition, the three-year limitation will act as an incentive for a discharged employee to find alternate employment that puts the employee's talents to best use.

ks:40

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 3-10-87
BILL NO. H.B. 241

HB 241 3/10/87 JUS

Sue Weingarten
Montana Health Care Association

MHCA represents over 2/3 of Montana N.H's - both proprietary and non-profit facilities. Many are locally owned & operated - many are County-owned or Religious-affiliated facilities.

Nursing homes have a difficult time recruiting & retaining employees. It's tough work - both physically & emotionally demanding & hours. Our rate is high. We care about our patient and care about our employees.

Nursing homes have been particularly exposed to unnecessary discharge suits as basis for recovery have been expanded and liberalized - for a couple of reasons:

1) Employees have access to both facility and patients meds and drugs;

2) Employees have access to the

patients.

Although the instances are rare, we do have situations occur where an employee takes drugs or slaps or otherwise abuses a patient, our 1st responsibility is the care and safety of our patients - and the facility has no choice but to dismiss the offending employee - knowing they will probably be sued.

The facility must learn from the employees attorney whose demand is limited only by imagination - and they are in court. I know of 37 these instances within the last 6 months.

This is an increasing and costly problem for us and we need your help.

We urge your "DO PASS" of HB 241.

SENATE JUDICIARY
EXHIBIT NO. 7
DATE 3-10-87
BILL NO. H.B. 241

HB 241

3/10/87
JUS

Sue Weingartner
Montana Solid Waste Contractors

Represent the private solid waste contractors in Montana, and urge committee's "DO PASS" on HB 241.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE March 10, 1987
BILL NO. HB 241

Billings
Chamber of Commerce

ISSUES '87

A PREVIEW OF THE ISSUES FACING THE
50th MONTANA LEGISLATIVE ASSEMBLY

SENATE JUDICIARY
EXHIBIT NO. 6
DATE 3-10-87
BILL NO. H.B. 241

Billings
Chamber of Commerce

December, 1986

Dear Legislator, Public Official, and Chamber Member:

I am sure you will agree Montana faces a number of weighty economic and political issues in the next two years. The Billings Chamber of Commerce has made a commitment to identify these major issues, and to make an objective presentation of information on opposing sides of each issue.

To fulfill this commitment, about 100 of our members and other interested citizens were polled to determine the most important issues. Fifteen issues were selected. For each issue, the Legislative Affairs Committee searched and found the most prominent spokesman from each opposing point of view. Almost all of these spokesmen graciously agreed to present their side of the respective issues. Their opinions appear unedited hereinafter. The Chamber position on any given issue was taken in late summer and is subject to change as facts and issues change.

I hope this time of great adversity facing Montana will provide motivation so we may all overlook politics and self-interest for our state. I trust you will find this manual a meaningful contribution toward this end.

Yours truly,

Charles J. Heringer, Jr. President
Board of Directors
Billings Chamber of Commerce

SENATE JUDICIARY
EXHIBIT NO. 6
DATE 3-10-87
BILL NO. 2, 3 H.B. 241

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EXECUTIVE SUMMARY

MAJOR ISSUES
1987 LEGISLATIVE SESSION

This report identifies and briefly explains the major legislative issues that are expected to face the 1987 Montana Legislature. The issues identified in this report were determined by the Legislative Affairs Committee based on their studies and through a questionnaire that was sent to selected Chamber members, state trade association executives and legislative leaders.

SALES TAX

The Billings Chamber has long supported the enactment of a general retail sales tax as a means of bringing greater balance to the state tax system. A special subcommittee of the Legislative Affairs Committee is currently in the process of drafting a sales tax bill. This bill is not being drafted as a method of increasing state tax revenue, but rather as a means of replacing some of the current heavy dependence on other taxes, particularly the property tax.

CHAMBER POSITION: The Chamber supports the enactment of a statewide sales tax as a replacement tax.

LOCAL OPTION TAXES

The growing concern over the level of property taxation will certainly result in local option taxes being a major issue in 1987. Historically the proposed legislation has allowed local governments, with a vote of the people, to impose such taxes as income, sales, hotel/motel and vehicle.

CHAMBER POSITION: The Chamber has generally supported local option taxing authority with the condition that any local taxes be imposed on a countywide basis.

COAL SEVERANCE TAX

In 1985, the Legislature enacted a "window of opportunity" in the state's coal severance tax that provides for a reduction in the tax for new contracts that result in increased coal production. During the recently concluded special session, an effort was made to place before the voters a constitutional amendment that would have allowed for a permanent reduction in the coal severance tax. Efforts are anticipated in the 1987 session to either reduce the tax permanently or to expand the "window of opportunity".

CHAMBER POSITION: The Chamber supported the "window of opportunity" and the constitutional referendum, but has no actual position on the permanent reduction of the coal severance tax.

HOTEL/MOTEL TAX

The real question appears to be how revenue from a hotel/motel tax will be used, not whether a tax should be imposed. The tourism industry believes that the revenue should be used to promote tourism and conventions while local governments believe they should receive the revenue. The industry also wants a statewide tax while local governments seem to favor a local option tax.

CHAMBER POSITION: The Legislative Affairs Committee is awaiting a recommendation from the Tourism and Conventions Council and/or the Billings Innkeepers Association before presenting a recommendation to the Board.

INCOME TAX REFORM

Enactment of the federal tax reform package could have a major impact on Montana income tax revenues and thus result in a number of legislative proposals being introduced. This stems from the fact that Montana could realize a $25-$40 million increase in state income tax collections without increasing the tax rates. The proposed federal changes would result in fewer deductions and therefore a higher federal taxable income. Since Montana uses the federal taxable income in determining state tax liability, the present state tax rates would be applied to higher taxable incomes resulting in higher tax liabilities. Because of the projected budget deficit, the Legislature will probably find it very difficult to return this windfall to the taxpayers. As of yet, the Chamber has not taken a position on how this increased revenue should be handled. Other income tax issues that are expected during the upcoming session are identified below.

Unitary Tax: Montana is one of the few states that still taxes corporations based on their entire worldwide earnings. Legislation is expected that will either repeal unitary taxation or at least limit it to the "waters edge", which means foreign operations would not be considered.

CHAMBER POSITION: The Chamber supports the repeal or at least the limitation of the unitary tax.

Corporate Income Tax: Because of the projected budget shortfall, it is anticipated that attempts will be made to increase the corporate tax rate.

CHAMBER POSITION: The Chamber has opposed attempts to increase the corporate tax rate.

Limiting Federal Tax Deductions: As a means of generating additional revenue, legislation is expected to be considered to limit the amount of federal taxes that can be deducted from the Montana income tax. A similar bill was introduced in 1985 which set this limit at $6000. Concern over such a limit centers on the potential impact on businesses that are operated as a sole proprietorship or partnership.

CHAMBER POSITION: The Chamber opposes limiting the amount of federal taxes that can be deducted.

Income Tax Surcharge: Reinstating the income tax surcharge was considered during the special session, and is expected to come up in 1987 as a means of addressing the budget shortfall. Some estimates during the special session were that the state needed a surcharge of perhaps as high as 40 percent.

CHAMBER POSITION: The Chamber opposes an income tax surcharge.

PROPERTY TAX REFORM

The Chamber has a long standing position that the heavy dependence on property taxes by local governments must be ended. The Chamber believes that property taxes could be reduced through the creation of a more balanced tax system that would include the enactment of a statewide sales tax. Pending the enactment of a sales tax, below are those areas of property taxation that the Committee believes will be considered during 1987.

Classifications: Attempts have been made in the past and are expected again in the future to separate commercial and residential real property into different classes. If this were to occur, it would become easier politically to raise the tax rate on commercial property because residential would not be affected.

CHAMBER POSITION: The Chamber opposed the separation of commercial and residential property for tax purposes.

Railroad Taxation: A number of legislative proposals and lawsuits have resulted in recent years resulting from how Montana levies property taxes on railroad property. At the center of the dispute is a federal law that requires that railroad property be dealt with in the same manner as other commercial and industrial property. In an attempt to comply with this federal law, the House in 1985 approved a bill that averaged the rates being applied to other business property and then applied this average rate on railroad property. However, the Senate amended this formula by adding gross and net proceeds taxes into the formula thus resulting in a higher average rate and thus higher taxes. As a result, BN has again taken the state to court.

CHAMBER POSITION: The Chamber supports removing gross and net proceeds taxes from the formula.

WORKERS' COMPENSATION

A substantial shortfall currently exists in the Montana Workers' Compensation Fund, and yet the rates paid by employers is higher in Montana than in the surrounding states. A special advisory council was formed in 1985 to examine the system and make recommendations to the 1987 Legislature. This group has submitted a number of recommended changes that would limit certain benefits while attempting to speed up the process. It is estimated that these changes would reduce rates by about 20 percent.

CHAMBER POSITION: The Chamber has endorsed the recommendations of the Workers' Compensation Advisory Council. See Editor's Note on page 19.

TORT REFORM

Although the present insurance crisis has focused attention on the liability problems in Montana, the Billings Chamber has been pushing for changes in the state's civil liability laws for a number of years. Initiative 30 was approved in November, and is expected that the Legislature will be asked to limit punitive damage awards, change the joint and several liability rule so that a single defendent is not required to pay the awards of all defendants, and amend the collateral source rule so that a plaintiff cannot collect several awards from different sources for the same claim.

CHAMBER POSITION: The Chamber supports limiting punitive damage awards. No position has yet been taken on the other two issues.

SULFUR DIOXIDE EMISSIONS

Montana has established emission standards for sulfur dioxide emissions that are more strict that the federal standards. As a result, the Billings ambient air quality has been in compliance with the federal standards, but not the state. To require the local plants that produce sulfur dioxide emissions to add additional pollution control equipment would require substantial expense. However, even if this equipment were added, there would apparently be no guarantee that the local air quality would meet the state standards since there is no model to determine exactly who is responsible for what emissions. Because there is a margin of safety factor built into the federal standards, industry spokesmen indicate they believe the more strict Montana standards are unnecessary for the public safety and are just another added cost of doing business in this state. A measure to reduce the state standard to comply with the federal standard was approved by the House during the recent special session, but was not considered by the Senate because of time constraints.

CHAMBER POSITION: The Chamber supports changing the sulfur dioxide emission standards to meet the federal standards.

WRONGFUL DISCHARGE

An area of growing concern for business people is the state's wrongful discharge laws. The problem isn't so much with the laws, but rather the lack of legislatively enacted guidelines. Many of the rules and laws dealing with the termination of employees have been established by court cases. An attempt to clarify this area was narrowly defeated by the House during the 1985 legislative session.

CHAMBER POSITION: The Chamber supports legislation that would clarify the employer-employee relationship in such areas as employment at will, probation and bad faith.

UNIVERSITY SYSTEM FUNDING

It is generally becoming accepted that Montana cannot afford the size of the university system that presently exists. The debate arises over how costs should be cut and what should be done with any savings that are realized. Regarding the cutting of costs, the question is should a unit or units of the system be closed, or can costs be cut sufficiently by ending duplication of programs and realigning remaining programs. There is also debate over whether any cost savings realized should be returned to the state's general fund to help ease the budget deficit or should the savings be retained by the university system to strengthen the remaining programs and/or units.

CHAMBER POSITION: The Chamber has not yet taken a position in this area.

BUDGET DEFICIT

This certainly will be the overriding issue in 1987, and just about everything else considered will be tied to this issue in some fashion. As part of its review of this issue, the Legislative Affairs Committee has asked the leadership of both parties to describe their views on what steps should be taken to bring the state's budget into balance.

CHAMBER POSITION: Although the Chamber has a general policy statement that calls for a reduction in state spending, broadening the tax base, and improving the state's business climate as a means of balancing the budget, no position has yet been taken on any other specific measures that are not listed above.

OIL AND GAS TAXES

Although a number of changes were made in oil and gas taxation in 1985 in an effort to make Montana more competitive with the surrounding states, these changes unfortunately were not made until the world price of oil was already on the decline. The Legislative Affairs Committee is currently seeking input from the industry on what can be done to stabilize and hopefully increase oil and gas production in the state. Although this information has not yet been received, two areas that apparently will be considered in 1987 are a reduction in the tax on stripper wells (wells that produce less than 10 barrels per day) and a moratorium on taxes on new production.

CHAMBER POSITION: The Chamber supports a reduction in the tax on stripper wells, but has not yet taken a position on the moratorium.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE 3-10-87
BILL NO. H.B. 241

SALES TAX

1. Should Montana impose a general statewide sales tax?

KEITH ANDERSON, PRESIDENT— MONTANA TAXPAYERS ASSOCIATION:

The retail sales tax ranks slightly behind the property tax as the most widely used of the major tax sources in the state-local tax system of the 50 states. Only 2.4 percent of the nation's population resides in the handful of states that do not levy a general sales tax; Alaska, Delaware, Montana, Oregon and New Hampshire. Montana, with heavy dependence upon the property tax, low population and economic growth, appears to be out of step with the realities of taxation as measured by other states.

The rationale for the retail sales tax rests on the belief that consumption is an appropriate basis on which to distribute a substantial part of the state and local tax load. All states have sales taxes. Montana is no exception, having levied $139.7 million in "selective" sales taxes for fiscal 1985.

The issue that has had to be faced in all states, because even "selective sales taxes" are not uniform from state to state, is how far sales taxes should be extended to pay for public services.

The key to the entire question of taxation is how to pay for public services. Very few states have extended their state-local tax structure to include a general sales tax because of "economic enlightenment" or the desire to bring about tax reform. Most general sales taxes have been enacted by political administrations and Legislatures, (some of them extremely liberal) anxious to appropriate ever increasing amounts of revenue for popular causes. In order to get into a position where a general sales tax was needed, Legislatures throughout the nation, have generally succumbed to pressures from special interest groups to appropriate in excess of revenue. As it is never popular to cut back on appropriations, Legislators have had to either increase existing tax rates or enact a new source of revenue—a general sales tax. Sales taxes have been enacted, (and in some states have been increased from time to time), in the other 45 states, because it has been politically impossible, or impractical, to further increase income, property or business taxes. The voters simply would not stand for it. As a result, a general sales tax was put on the books as the least offensive alternative.

To our knowledge, the advent of the general sales tax has not been heralded with great acclaim by the taxpayers in any state, any more than an increase in the income tax or property tax would have people dancing in the streets. It has simply been a lesser of the tax evils. As far as politics is concerned. 35 states adopted the general sales tax when a Democrat governor was in power and 10 states when a Republican governor was in the chair.

For fiscal 1984, total sales and gross receipts taxes provided $95.8 billion, or slightly less than one-half of the total revenue collected from the 50 states. Sales taxes have been stable revenue producers, keeping up with inflation, and tending to provide a stable tax base during poor economic times.

Property taxes for fiscal 1984, for the 50 states, amounted to $96.4 billion, ranking slightly more than sales tax collections.

Montana makes up in above average property taxes what the other states impose in general sales taxes. The average tax structure in the United States is financed 21.65 percent by general sales taxes and 33.24 percent by property taxes. In Montana property taxes finance 47.13 percent of all state and local revenue and there is no general sales tax. Selective sales taxes provide a significant share of revenue in the Montana tax structure—13.08 percent as compared to the national average of 11.50 percent.

Some states, in addition to increasing revenue for general government, have attempted to bring about tax reform by reducing property taxes or preventing increases in property and income taxes. Idaho is a good example of a state seeking tax reform through the sales tax. In Idaho property taxes immediately were reduced and since the imposition of the sales tax, property taxes have grown at a lessor rate than if the sales tax had not been adopted. Tax reform, through the general sales tax, depends on how bad off a state is financially.

In states other than Montana, the opposition to a general sales tax from the historical opponents of labor, low income groups, the elderly and the like has been diminishing. These groups have toned down their opposition for a very simple reason. They are the beneficiaries and the recipients of sales tax revenue for programs they want funded. Hence, many states have seen labor unions, teachers unions and the like supporting a sales tax in order to fund the programs they want.

John Kenneth Gailbraith, a noted economist and author of the book, "The Affluent Society" , stated as follows: "American liberals—opposing the sales tax—have been, all things considered, the opponents of better schools, better communities, better urban communication, and even of economic stability." In fact, he concluded, "The poor cannot afford not to have a sales tax." The issue in Montana is the level of public spending and the way public spending is being financed. Our problem is not unlike that of states that have already adopted a sales tax. The Legislature appears to be unable to say no to the special interest groups, who in reality are the chief beneficiaries of increased taxation. The voting public are adamant against increased income, business and property taxes. There is a serious state deficit situation, again largely caused by the public school, county, city and other special interest groups who have prevailed on the Legislature in the past to appropriate above income.

Should there be a general sales tax in Montana? Because of the magnitude of revenue involved there is no other tax to turn to if public spending isn't sharply curtailed at all levels of government, including the public schools. It must be remembered, however, that the general taxpayer, living, working, and doing business in Montana, is looking for tax reduction, not a new tax to pay.

REBUTTAL BY JIM MURRAY, EXECUTIVE SECRETARY MONTANA STATE AFL-CIO:

The issues of governmental budget revenue and sources of taxation are undeniably intertwined. Without the latter, the former wouldn't exist. However, it would be fallacious to presume that a budget shortfall always exists because of the structure of a tax system or even the so-called demands of special interest groups. For example: The current budget crisis in Montana governmental units exists, in part, because of a revenue shortfall under our existing tax structure. The shortfall exists not because the tax structure is bad, or because of excessive spending, but because our economy is suffering and resultant tax payments are reduced accordingly. Those areas where our economy is suffering the most are in agriculture, timber, mining, oil and coal production. In addition, state and local governmental units are suffering a reduction in interest income earned on investments and a steadily declining level of federal revenue sharing.

All of these trouble spots are in areas outside of the control of Montana government. Economic recovery is at the mercy of federal farm programs, trade policies and budget priorities. Without major policy changes at the federal level resulting in economic recovery, changing our tax structure here in Montana only results in shifting who pays, not necessarily how much is paid.

It is argued that Montana has an imbalance in our state tax system relying too heavily on income taxes and property taxes. Those arguing for change urge Montana to adopt a sales tax to reduce reliance on property taxes. They suggest that such a move would bring our system more in line with the rest of the nation where approximately 21.65% of all tax revenues collected are from sales taxes. What they don't tell you is that Montana is one of only a few states where mineral property taxes replace a sales tax as a means of tax balance.

Montana is a mineral-rich state which, in 1984, ranked 8th in the nation for minerals produced per person. Property taxes paid on these minerals account for 22.4% of our total tax collections (slightly more than average sales tax collections nationwide). Additionally, these taxes are paid almost entirely by persons residing outside of Montana. This is in contrast to a sales tax which would be paid to the greatest extent, by Montana citizens.

State and local government and education in Montana need revenue, about that there is no question. But reducing property taxes on business and minerals, which account for over 75% of all property taxes paid and shifting that burden to workers, senior citizens, low income persons and other individual taxpayers through a sales tax is not the answer.

SALES TAX

1. Should Montana impose a general statewide sales tax?

JIM MURRAY–EXECUTIVE SECRETARY, MONTANA STATE AFL-CIO:

Is a sales tax really the answer to Montana's current budget crisis? Sales taxes are regressive. They fall heaviest on those least able to pay: working people, low-income individuals, the elderly, and those on fixed incomes. Taxpayers with higher incomes pay a smaller share of their income on a sales tax than lower income people. Even exempting food and medicine, families struggling to survive would still be forced to pay increased costs for children's clothing, non-prescription drugs, an automobile, cleaning supplies, and other essential non-food items.

A sales tax is an added tax. It is NOT a replacement tax. In tax year 1986, the estimated property tax levied in Montana will raise about $575 million. In order to replace property taxes, Montana would have to levy a sales tax of between 14 and 16 percent with no exemptions. A 5 percent sales tax will generate only $200 million. So property owners are faced with the prospect of a substantial sales tax or a sales tax and property taxes combined either of which would mean a tax increase. To give you an example: an average Missoula homeowner with a $50,000 home and a family of four, paid $475 in property taxes in 1985. By reducing property taxes 30 percent, the homeowner saves $143. But with a 5 percent sales tax, the homeowner will pay approximately $696 per year in sales tax. This means an overall tax increase for the homeowner of $533 per year!

For farmers and ranchers, their implements, fertilizers, etc. would all be subject to a sales tax. A 5 percent sales tax could reduce their property taxes by about 36 percent but would result in a net tax increase averaging about $1,440 for each of Montana's farmers and ranchers.

Retail merchants on Main Street Montana would be burdened with administrative costs resulting in higher prices for consumers. In addition, merchants would have to pay the sales tax on credit sales before receiving cash payment.

If a sales tax would not relieve the tax burden on most Montanans and in fact would increase their total taxation, why then would anyone want to enact one? The answer is simple: to provide tax relief for the large corporations in Montana. Businesses and corporations pay 73 percent of Montana's property taxes. Obviously, they would be the beneficiaries of any reduction in property taxes. If Montana were to enact a sales tax which would reduce property taxes by 30 percent, Montana Power, for example, would save over $7 million while an average homeowner in Missoula would save less than $150.

Montana is facing a severe budget deficit that cries out for tax reform. But a sales tax is not the answer. The answer is a progressive tax system in which people and corporations pay according to their means. We must not allow Montana"s working men and women to carry a disproportionate share of the tax burden.

REBUTTAL BY KEITH ANDERSON–PRESIDENT, MONTANA TAXPAYERS ASSOCIATION:

The "regressive" argument against the sales tax, used by labor unions in Montana, is a political argument rather than one founded on sound economic rationale. Labor has been very successful in using this argument, with the objective of electing candidates to public office with the apparent objective to increase or maintain taxes on the business sector at a high level.

Recent studies at Montana State University show that a sales tax is progressive instead of regressive. This shouldn't surprise anyone, considering that the more dollars people make, the more they spend and, in addition, they purchase higher priced items. A Tax Foundation Inc. study shows that government taxing and spending, taken in tandem, results in a definite redistribution of income (taxes) in favor of low-income families. Those families, comprising the lower half of the income distribution, receive more in government benefits than they pay in taxes. In fact, the lower the income, the more favorable the tilt of government spending. The benefits of government spending are definitely pro-poor, which shouldn't be a surprising conclusion. In fact, when costed out, the poor really don't pay taxes, until they reach certain income brackets, because they are the net beneficiaries of taxes others pay.

A sales tax can obviously be written as a replacement, or partial replacement, for the property tax. In fact, an Oregon sales tax measure to be voted on at the November election, and sponsored by the Oregon Education Association (the Oregon Teachers Union) has been written to reduce home-owners and renters property taxes by $272 million. The 1971 Montana sales tax act, which was opposed by labor and the teachers unions, had much of its revenue dedicated to property tax replacement in the area of public education, welfare and the like.

Labor, and their allies, have been a constant enemy of tax reform in Montana, being dedicated to high property, income, business and mineral taxes. At the same time labor is the constant backer of additional public spending for social causes; education, higher salaries for public employees (their own members), the elderly, expansion of government, and the like. Their very demands are forcing Montana into a sales tax position— a position where the sales tax **will be** an additional tax, when enacted, because there won't be revenue available for property or income tax reform.

Labor is constantly attempting to increase public services and the costs of government, and at the same time restrict and limit the tax base to those taxes paid by the business community and income tax payers.The general sales tax is a broad based tax and is stable during poor economic times. Not so with income taxes and property taxes in an agriculture state.

Property taxes, income taxes, taxes on natural resources, and other business taxes should be moderate to be competitive with other states, but labor insists they be increased, therefore driving another nail into the coffin of no growth that has become Montana.

ALTERNATE FORMS OF TAXATION

2. Should local governments have the authority to impose alternate forms of taxation?

REPRESENTATIVE JACK SANDS—Billings:

The present debate over local option taxes clearly is one of the most important financial, political, and tax policy issues to have faced Montana in recent years. In this debate, it is very important to distinguish between two related but very different tax functions. Historically, state government has been the exclusive **tax writing** authority for all of Montana; it has also had a major role in **setting tax levels.** However, local governments such as counties, cities, and school districts, have shared in setting tax levels, primarily in the property tax area which is their basic funding source.

The State Legislature should remain the exclusive tax writing authority for several reasons. First, this reflects the appropriate respective roles of state and local governments in our state and across the nation. Traditionally, local governments have been governments of limited powers which have only that authority expressly granted by the state government. In the 1972 Constitution, Montana granted much broader authority to local governments, although even here the imposition of local taxes on income or the sales of goods or services was prohibited.

Second, because the power to tax is the most widespread and powerful of government functions, it should be carefully limited. Restricting it to that element of government representing the broadest range of political, economic, and geographical interests in the State will serve this function and thus help insure fair and uniform taxes for all groups and interests.

Third, uniformity in taxation is essential. Montana has 56 counties, 133 cities and towns, 456 school districts and countless numbers of other local government entities, such as fire districts, special improvement districts, and irrigation districts If each were given power to write its own tax laws, Montanans would be subjected to a virtual maze of independent tax laws. Where even small businesses and farms often operate across the boundaries of several cities, counties and school districts, this would add enormous difficulty to tax reporting, collecting and paying. It could obviously add substantially to the amount of the tax burden as well.

Fourth, local governments often lack the technical staff and tax expertise to design an independent tax system.

Having said that the Legislature should be the exclusive tax writing authority does not mean, however, that there shouldn't be an expanded role for local governments in setting the **level** of taxes within their respective jurisdictions. It is important to allow local governments to have greater control over their funding sources because they are closest to the people and more knowledgeable about local needs.

Another important consideration is that in recent years local governments have been quite successful in obtaining state funding for traditional functions of local government. Some examples are state assumption of district court costs, state assumption of welfare, allocating one third of the oil severance tax to the local government block grant program, and a law mandating a greater mill levy across the state for the support of the school foundation program. The mechanism generally employed was to provide state funding for costs over a certain level, thus providing assistance to local governments who have not controlled costs as well as others. The rationale used was that local governments lacked an adequate revenue base to support increasing costs in these areas.

The effect of such state assumptions has been to diminish local control and to transfer wealth from communities that have been able to control costs to those that have not. Giving local governments greater authority to set their own revenue levels would help stop these undesirable consequences.

I believe that these many important considerations can all be addressed by a well-tailored local option tax. Such a tax, written by the state, should be authorized under strict guidelines permitting local option taxes only as an add-on to specific broad-based state taxes. Two prime examples of broadbased state taxes suitable for local options are the income tax and the sales tax, if one were to be enacted. Thus if the state had a three cents sales tax, one or two cents could be authorized as an add-on for local governments. Likewise, a percentage of the state income tax could be reserved for a local option. For added protection, the tax should be permitted only after approval by local voters.

This kind of local option authority would serve the objectives of both sides to this debate. By requiring that the local option tax be tied to a generally available state tax, Montanans would continue to have a single tax law and set of regulations to comply with. The taxes would be uniform and broadbased in their application and impact. The state legislature would continue to be the state's sole tax writing authority. At the same time, local governments would have an expanded role in setting their own tax levels. They would be able to broaden their local tax base, relieve their almost total dependence upon property taxes, have more control in setting their own funding levels, and have local resources available to support traditional local functions.

While local option taxes may appear to be a rather exotic subject, they can have a profound effect on every citizen in our state. Local governments spent a total of $514 million last year, compared with total state general fund expenditures of $366 million. Giving local governments greater authority over these large expenditures will bring government closer to the people and, with the protections I've suggested, provide a fair and equitable basis for funding the local services that are so important to all of us.

REBUTTAL BY MAYOR JAMES VAN ARSDALE—Billings:

As the Mayor of Billings, I would certainly agree with Jack Sands' statement that giving local governments greater authority to set their own revenue levels will make local governments more accountable for control of their expenditures and will bring government closer to the people. I would also agree that one viable form of local option taxation is a local option add-on to a broad based state-wide tax.

However, I would strongly disagree that the **only** viable form of a local option tax is one which is added on to a state tax imposed by the State Legislature. The basic assumption behind that position is that the voting public can't determine what is in their own interest and that State Legislators are the primary owners of political wisdom. When local option taxes must be voted on by referendum, local citizens have a say in local tax policy, which is the most reponsive form of taxation. Additionally, cities would be willing to support a sunset provision which means we would be required to continue justifying our needs if we wished to continue a local option tax over time.

To say that uniformity in taxation is essential suggests that all other factors that go into tax policy are also uniform. I would argue that needs, resources, opportunities, political orientations, and community philosophies are not uniform throughout the State of Montana. Due to the wide diversity of Montana communities, not all communities will agree to the same percentage or the same revenue amount needed for projects in their respective towns. Many other states have found local option taxes to be quite workable.

The issue has also been raised about whether local governments have the technical ability to adequately write and enforce a viable local option tax plan. In the City of Billings, the voters approved a bed tax which was collected until the Supreme Court disallowed it. The money was locally collected and accounted for. The City of Billings had an internal auditor that was assigned to maintain the integrity of this system and there were no problems. It may be true that some of the smaller communities in Montana would not have the professional staff for them to feel comfortable with developing and enforcing a local option tax. For these communities, we would agree that an add-on to a State collected tax is a viable alternative. However, to eliminate this alternative for those cities who are professionally able to handle the process creates unnecessary restrictions.

In summary, Jack Sands and I would agree that local option taxes provide the opportunity for a fair and equitable basis for funding the local services that are so important to all of us. Our only area of disagreement is the latitude that should be provided to local government officials to take a pro-active role in assessing and solving our own problems. I believe that the local level has always been the most accountable level of government and deserves the opportunity to take a broader role in solving our own problems including setting tax policy.

ALTERNATE FORMS OF TAXATION

2. Should local governments have the authority to impose alternate forms of taxation?

MAYOR JIM VANARSDALE—Billings:

What is a local option tax?

A local option tax is an alternate revenue source (other than property taxes) that can be designed and approved by the residents of a community. Under the proposal being offered by cities, any local option tax would be approved only by a referendum. One advantage of a local option tax is that it can be structured to tie a specific revenue source to a specific service. Thus, it is possible to ensure fairness and equity in the generation of the revenue and provision of service.

Cities would also be willing to include an automatic sunset and/or renewal by referendum provision. This would assure ultimate accountability. Voters would decide on implementing the tax, and then would decide whether it had been used in the way that they had intended. A local option tax can be tailor-made to reflect local desires, local needs, and local priorities. It can also send a clear message if certain services need to be reduced.

What are specific examples of local option taxes?

West Yellowstone has already been authorized to implement a resort tax. Certain luxury items, which are those most used by visitors, are taxed while staples, such as cars and food, are not. Thus, West Yellowstone is able to obtain money from visitors who are using services but would otherwise not pay for those services. Another example of a local option tax is a fee put on the room rate at motels and hotels, sometimes called a bed tax.

A local option tax could include any variety of measures approved by the voters. It could be a generalized or targeted sales tax. It could include a local option add-on for the income tax, value-added taxes on items produced in a community, excise taxes, or real estate transfer taxes. Again, although there are a broad variety of alternatives to be considered, only those which are acceptable to the community would be approved and implemented.

Why should we want local option taxes?

One of the primary reasons to support local option taxes is because it provides a diversified tax base that would allow relief for property taxes. The debate on Initiative 27 and Initiative 105 clearly identifies that Montana residents are unhappy about the level of property taxes. Local option taxes are a positive alternative. They provide a way for voters to choose whether to reduce services or to seek alternate means of funding those services.

Additionally, depending on the kind of local option tax implemented, they would provide a way for visitors to contribute to the cost of the services that visitors use, but which are paid for by local residents. However, the fundamental reason for supporting local option taxes is that it provides for maximum decision-making and accountability at the local level. As such, it is the most responsive form of taxation.

It is unrealistic to think that a legislature which meets 90 days every two years and deals with a multitude of statewide issues can adequately address the individual needs of all Montana cities. The needs, desires, and resources are radically different between the very small towns and the larger cities. Local option taxes provide a way to tailor-make a tax structure so that each community can be well-served.

Why must this go before the legislature?

Historically, the City of Billings has felt that we should be able to implement certain kinds of local option taxes under our self-government powers. However, as we have tried alternatives, the Supreme Court has issued unfavorable decisions. These Supreme Court rulings have significantly limited our ability to use the self-government powers that were intended in our Constitution to provide cities with maximum flexibility. As such, we must go back to the legislature to get specific authorization to implement local option taxes.

There has been much discussion about the tax problems on a state-wide basis. Local option taxes are not a solution to all of the state-wide problems. However, local option taxes are a means for cities to handle their share of the problem. Cities are prepared to accept the responsibility of developing, marketing, and being responsible for local option taxes if we can only receive the authority to do so. In this way, cities can provide some relief for the state-wide tax problem.

REBUTTAL BY REPRESENTATIVE JACK SANDS—Billings:

I agree with the objectives sought by Mayor Van Arsdale, but not entirely with the means by which he seeks to accomplish them. The objectives of broadening the tax base of local government and giving them more control over their own funding sources are desirable, but he would do that by giving local governments open-ended authority to compose any tax system desired by the local government and a majority of local voters.

He doesn't explain how these overlapping tax jurisdictions— counties, cities and school districts to name just three—would coordinate their diverse taxing systems among themselves, or with neighboring local governments and the State.

In many respects, he suggests a kind of feudal system where each local unit would be an all-encompassing autonomous jurisdiction with its own exclusively written revenue sources, independent from its neighbors and the State. In doing that, he goes too far. He creats the possibility of vastly expanded inter-community tax competition, a tax system unparalleled in its complexity and diversity, and a system that could eventually add substantially to the tax burdens of local citizens.

A better way would be to let the State Legislature write the tax laws, and then to allow local governments the option of having an add-on to any broad-based, generally available state tax. This would satisfy our common objectives without the undesired consequences outlined above.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE 3-10-87
BILL NO. H.B. 241

COAL SEVERANCE TAXES

3. Should Montana's coal severance tax be reduced?

JIM MOCKLER–EXECUTIVE DIRECTOR, MONTANA COAL COUNCIL:

In order to answer the question, it is necessary to first go back to the 1975 Legislature and examine the reasons given for the passage of the tax. When the tax was passed, it was accompanied by a conference committee report explaining the purposes for its level. The preamble states in part "... A tax differential between Montana and Wyoming may shift some new contracts to Wyoming ..." The intent of the tax is clear. Opponents to coal mining had just lost a bill in the House to ban surface mining in Montana. That bill failed by a single vote and the stage was set to if not prohibit the industry from operating altogether in the state, at least limit it and shift new business that the industry may have competed for to Wyoming. The expressed intent was clear.

Three other reasons were stated in the report in support of the tax: "A) To preserve or modestly increase the revenue to the general fund; B) To respond to social impacts attributable to coal development; and C) To invest in the future, when new technologies reduce our dependence and mining activities may decline." In 1974 the general fund received $3.32 million from the coal tax. While the statement read that the desire of the 30% legislation was to "preserve or modestly increase this amount", the fact is that the prime sponsor himself estimated that the general fund would receive $26 million under the new tax or an increase of 783%.

While there was much ado about "social impacts", keep in mind that on top of the 30% severance the Legislature also passed an additional gross proceeds tax which is paid to the county where the coal is mined and is added to the county's property tax rolls. This tax averages about 4.5% of the f.o.b. mine price.

In 1977, the Legislative Fiscal Analyst's report stated: "Our review of counties, incorporated towns and school districts in areas certified as impacted by coal development shows that, with few exceptions, the impacted units have the means to finance the required expenses without state support. The coal area is characterized by some of the lowest mill levies in the state and has been blessed by mushrooming property valuations. This analysis would indicate that the need for state supported local impact grants may be much less than originally anticipated by the Legislature." The Legislature has responded by nearly eliminating severance taxes to impact areas.

There is now about $300 million in the permanent coal tax trust fund set aside for "the future". The problem is no one has ever said when the "future" starts, who is eligible to participate or how many lost jobs need to be exported in order to save "the future". Those who would like to work and be productive here and raise their children and grandchildren here feel that the future is now and that $300 million saved from their labors is enough of a legacy for "the future".

When Montana made its decision to shift the new contracts to Wyoming in 1975, we produced 22 million tons of coal and Wyoming 23.8 million tons or a difference of 9.2%. Ten years later in 1985 Montana produced 33.1 million tons and Wyoming 140.4 million tons, a difference of 424%. While Wyoming's total tax rate is less than half Montana's, last year they collected over twice as much money, employed around four times as many people, and enjoyed all of the secondary benefits that come with a healthy expanding industry and the associated high-paying jobs.

In January 1986, a poll of the Montana coal producers showed that 1986 production was expected to be 36.1 million tons, a gain of 3 million tons over 1985. As of September, it appears our production will be around 30 million tons, a loss of 6 million tons under our own projections and 3 million under last year. In addition we have been forced to lay off several hundred of the highest paid, most productive workers in the state. Not only is it a loss to them, but also to the secondary businesses that supply the industry with goods and services and who in turn support the entire economy.

While we all were pleased with Westmoreland's announcement of a new 1 million ton per year contract, at the "window of opportunity" rate of 20%, it is with limited celebration as we watch our traditional customers comply with the wishes of the 1975 Legislature and take their business to Wyoming.

Wyoming currently has a severance tax of 10.5% and an ad valorem tax of approximately 6.5% for a total of 17%. As of January 1, 1987, the severance tax is to be reduced 2% to 8.5%, plus the 6.5% for a total of 15%. Montana has a 30% severance tax, approximately 4.5% gross proceeds tax and a Resource Indemnity Trust Tax of .5% for a total of 35%.

The question is not so much whether Montana's coal severance tax should be reduced but whether Montana should have a coal industry. If the answer is, as it was in 1975, "No, let it go to Wyoming, then leave it as is. If the attitudes have changed and the answer is "Yes, we do want the industry, the jobs and the economic advantages", then the tax must be lowered to at least Wyoming's level.

REBUTTAL BY SENATOR TOM TOWE–Billings:

Mr. Mockler has quoted out of context and has his facts confused. The Conference Committee report from which Mr. Mockler quoted does say some new contracts **may** shift to Wyoming, but also refers to "the problem-ridden boom towns like Rock Springs." It states that if production in Montana doesn't grow as rapidly in Montana, it will give towns time to grow in a more orderly fashion. "That the coal industry will grow even with this tax is not doubted by the Conference Committee." Secondly, the bill Mr. Mockler refers to was a moratorium, not a prohibition against coal mining. It was a moratorium to limit coal production **until** Montana passed the necessary reclamation laws, eminent domain laws, and air and water quality laws, properly regulating the coal mining activity that was about to commence. The bill, which was in the 1974 Session and not the 1975 Session, was postponed until all of the other matters were first adopted. The only remaining item not taken care of when the moratorium bill was finally defeated was the coal tax issue which was set over until the next legislative session. At the same time, in 1974, a bill to prohibit coal mining altogether was introduced and received very few votes. Mr. Mockler is absolutely mistaken in his anslysis of the history of the coal tax bill.

The increased activity in Wyoming was already set in place by 1975—a flurry of activity in Wyoming, including considerably more federal leasing, dictated greater coal production in that state whether or not Montana passed any coal tax. Similarly, today, if we reduced our coal tax to zero, I do not believe we would sell $1.00 more in coal than we will if the tax remains in place. As previously stated, Wyoming has its advantage in its market area, and we have our advantage in our market area, and no one can prove that the difference in the coal tax will make any difference in the marketing of coal by other states. Nevertheless, with the window of opportunity, the effective rate in Montana is approximately 13.3%, and the effective rate in Wyoming is approximately 11.8%—such a small amount of difference that it clearly will have no impact on the sale of coal.

It is also significant that mines and plants in Wyoming are closing. Wyoming has such a hugh overcapacity that it is hurting much more than Montana in spite of some layoffs in the coal industry. In fact, the Big Horn Mine north of Sheridan in Wyoming will close down altogether in the next few weeks, and the entire contract requirements will be met at Decker, in Montna. This would have happened whether there was a window of opportunity or not because of the physical character of the coal deposit and the mining costs.

I would suggest, instead, that we use a small fraction of the money that some people would like to "give away" to the coal industry (reduced taxes) in coal related research. With a small fraction of the money we lost as a result of the window of opportunity, we could perhaps obtain some technological breakthroughs that would enhance Montana's coal industry very substantially. Our money would be far better spent in this manner if we are serious about our coal industry. In the long run, it will have a far more reaching effect on the stability and employment from the coal industry than giving special tax relief at a time when there is a downturn in the energy needs nationwide.

Again, we must not ignore the fact that major reductions in Montana's tax will undoubtedly prompt a similar reduction in Wyoming's tax which will then leave us right back in the same position as before. If this mentality and attitude is allowed to continue, it will finally result in zero taxes in both states— a situation which is hardly in the best interests of anyone.

COAL SEVERANCE TAXES

SENATE
EXHIBIT NO.
DATE
BILL NO.

3. Should Montana's coal severance tax be reduced?

SENATOR TOM TOWE—Billings:

No. I think it is extremely poor policy to cut taxes just because the economy turns down. Many factors affect a downturn in the economy including the weather, the Arabs, energy conservation, national energy policy and statutes, and a number of other things over which Montana has no control. To suggest that the moment the energy situation looks weak we should run out and reduce our taxes on coal, oil, gas and other minerals is to suggest a wholly unrealistic response. Most tax relief proposals stemming from this motivation are unfair to competitors, unfair to other taxpayers who have to assume a larger tax burden to make up the difference, and are substantially ineffective.

As it relates to coal taxes, we definitely should not panic just because the coal market is weak. Forecasters suggest the energy glut will vanish by 1989 and, by 1993, we will be back into an energy crisis—albeit not as severe as in the mid-70's. Silverman and Duffield (University of Montana) predict Montana's coal production will double by the year 2000 whether or not the tax is reduced and whether or not the HB 607 credit remains in place. By that time, looking back, we will look foolish to have reduced the taxes only to be locked into a position where they cannot be returned to the original level.

I know that coal companies and employees of coal companies will say we cannot wait until 1993. If anyone could prove that lowering taxes would make a difference, it would be reasonable to look at a temporary reduction. Unfortunately, however, proof is not available. First, the coal severance tax is a small part of the **delivered** price of the coal (about 8%)— transportation is over 60% of the cost. In fact, if the Burlington Northern Railroad would reduce its freight rates to Minneapolis to the same as the 1.54 cents per ton mile charged by its competitor, Chicago & Northwestern (out of Gillette, Wyoming), the savings would be comparable to a reduction of the Montana coal tax by 50%. The coal tax differential is only 45% (17.5% with the HB 607 credit.).

Second, Wyoming has markets that we are unlikely to compete with because of the distance—we cannot ship **across** Wyoming to the southern part of the United States and expect to be price competitive with Wyoming coal which does not have the extra freight. Similarly, we have a market area in the upper midwest, Minneapolis and Superior in particular, which is a major advantage to Montana because of the distance. Wyoming will have to sell its coal at approximately $3.50 per ton in order to actively compete with Montana coal in the Montana market area. While there may be some sales on a spot market basis at below $5.00 because of Wyoming's enormous overcapacity in their coal mines, they will not sell coal that cheap on a sustained, long-term basis. Consequently, no one can establish that a reduction in coal taxes in Montana would make a difference.

When we suggested the language in the Window of Opportunity (one-third tax credit for new contracts) be contingent upon a showing by the utility purchasing the coal that a competitive bid in Wyoming would have been accepted but for the Window of Opportunity, thus disallowing the credit unless the reduction would land a contract, the supporters of the credit refused. Consequently, we are left to guesswork on this issue. At $3.50 for Wyoming coal to be competitive, I remain unconvinced that any tax break would make any difference whatsoever. (Western Fuels insisted the Window of Opportunity did make a difference in the recent Westmoreland contract. But they failed to substantiate that claim.)

Third, there is no guarantee that Wyoming will not simply follow suit by reducing their tax, thus giving us a challenge to reduce ours once again to be more competitive, thus giving Wyoming an opportunity to reduce theirs a second time, and so on. While the coal industry would undoubtedly be delighted at such cutthroat competition in a tax war between Montana and Wyoming, it does not make sense for either state to be dragged into such a situation.

I propose instead of letting ourselves be tricked into a quick-fix tax relief, that we devote our energy and money to a long-term solution. If we would only use some of the coal tax monies for research—Montana is the only major coal-producing state that does not have a coal lab—we could develop (1) coal that would be cheaper, (2) coal that would be more valuable, (3) other uses of coal, and (4) many other benefits to our coal industry. This we can do, and can do effectively, and should do if we are serious about our coal industry in this State.

Another far more important matter is the federal air pollution standards. With threats of acid rain legislation based on percentage of scrubbing rather than emission effect, we are at a serious disadvantage. Obviously, scrubbing 90% of the sulphur out of Montana's .3% coal is more difficult than scrubbing 90% out of Illinois' 3.0% coal. Yet, this is exactly what the Clean Air Act of 1977 required. It had absolutely nothing to do with air pollution but was an attempt by the more numerous congressional delegations in the midwest and eastern coal states to limit the marketing of Montana's and Wyoming's low sulphur coal. Reversing that unfair decision would be far more effective in preserving employment and jobs in the coal industry than reducing Montana's coal severance tax.

Giving tax relief to a specific industry as soon as that industry develops difficulty because of a downturn in the national economy is a terribly dangerous precedent. It is generally not effective, is generally very harmful, and should be avoided.

REBUTTAL BY JIM MOCKLER—EXECUTIVE DIRECTOR, MONTANA COAL COUNCIL:

It is amazing to find that tax reform and relief from punitive taxation is unfair to competitors and other taxpayers. Studies by people with no real knowledge of the market are at best speculative. In the changing market of today we well may not have a market for coal by 1995.

Several of Montana's customers have reduced their Montana purchases and replaced that tonnage with Wyoming coal. The energy glut had nothing to do with it, price did. Taxes are a part of the price. For products which must be refined such as coal, obviously, the tax is a small percentage of the end product. The same could be said for wheat as it applies to a loaf of bread or timber as it applies to a finished home. The fact remains that the raw products compete with raw products. The market will consume the most value for its dollar and taxes can and do make the difference.

The only people who know what the freight rates are are the customers who pay the bill. They have repeatedly stated that there is virtually no difference in rates between Montana and Wyoming and to imply otherwise is simply a poorly veiled attempt to create supposition as fact in order to justify the means.

In 1975 Senator Towe predicted that surrounding states would follow Montana's example of punitive coal taxes. They did not. Wyoming's tax is scheduled to drop in 1987 by 2%, not because Montana is considering lowering their's but because they deem its purpose to be met. Just as Wyoming did not follow Montana's lead in raising their tax, absolutely nothing is to suggest they would lower their tax if Montana did.

While the Clean Air Act Amendments of 1977 serve a disservice to western coal, there is no provision that requires low sulphur coal to be scrubbed to 90%. All coal must be scrubbed 70%, with higher sulphur coal being scrubbed as high as 90% depending on sulphur content. Previously nearly all Wyoming coal and some Montana coal (Decker area only) could be burned without any scrubbing.

To people with absolutely no financial stake at risk to cavalierly state that several hundred miners can wait five or six years for their jobs back, several hundred more people who have lost their jobs as mechanics, service technicians and the supplying industry as a whole or dozens of small businessmen who rely on the industry can simply wait, and the industry can watch their millions of dollars in investments gather dust a few years because someone thinks the market may come back as repugnant at worst and sad at best.

It is time to review the coal tax policy and to save a once viable industry. The 1990's are too late—too late for the miner, too late for the supplier, too late for the small businessman, too late for the industry and too late for the State of Montana's economic benefits.

HOTEL / MOTEL TAXES

4. If Montana imposes a statewide hotel / motel tax, how should the revenue be used?

ALEC HANSEN, EXECUTIVE DIRECTOR MONTANA LEAGUE OF CITIES AND TOWNS:

Virtually every other state in the country imposes taxes on occupied hotel and motel rooms. These states have recognized that this is a fair and reasonable method of diversifying their tax structures by sharing some of the responsibility for financing needed services with non-residents and business travelers.

There is no question that people who come to Montana to hunt and fish, to visit recreation areas or to conduct business exert pressures on local services. During the summer travel months, more than 10,000 tourists visit Bozeman each week. Additional police and fire protection, street maintenance, sanitation and other services are required to accommodate these travelers, and local taxpayers cover the costs.

A study conducted by the University of Montana indicated that non-residents accounted for 52 percent of all the travel expenditures in the state during 1983. If an accommodations tax were enacted, a majority of the revenue would come from outsiders. It is also important to recognize that a significant portion of the in-state travel expenditures are for business purposes which are generally reimbursible.

Common sense suggests that an accommodations tax would be one of the most appropriate ways of diversifying Montana's system of government finance, because a majority of the revenue would be collected from non-residents and business travelers.

A fair tax policy assures that people pay for the services they receive, and it is time that this concept is applied by Montana to the millions of tourists who visit this state every year.

REBUTTAL BY HERBERT LEUPRECHT, CHAIRMAN OF THE BOARD—MONTANA INNKEEPERS ASSOCIATION:

As a leading service industry in our economy; an industry that is small business profit-oriented and labor intensive, using a vast range of skills; and as an industry that can be stimulated, developed and managed by the private sector, tourism has moved from a high priority to a critical priority for Montana's economic survival. Tourism is currently the second largest industry in Montana, but unless we can afford to be as agressive as our competitors, we can plan to see a decline in our share of the market.

Montana does not have a budget large enough to be competitive. There are so many voices trying to get the attention of the traveler, using sophisticated marketing techniques, that we've been lost in the shuffle. The Montana Travel Promotion Unit coordinated an awareness study within the Northwestern region of the United States which showed that better than half of these vacation planners were only "somewhat familiar" or "not familiar" with our State. These vacationers indicated that they were not thinking about Montana as a destination. As disturbing as this is, it would certainly indicate that we have an excellent growth potential, but at our present level of activity, we are not being heard!

With these concerns in mind, the Montana Innkeepers Association has taken a bold step by supporting a plan to tax ourselves, using these funds to promote tourism in Montana in order to develop our share of the tourist business.

Alec's comments indicate to me that he views Montana's visitors as people who exploit our communities, putting pressures on public services without paying their fair share. In fact, pleasure travelers last year spent more than 300 million dollars in our cities and towns. These thoughts led me to dig a little deeper into the economic benefits of investing these tax revenues into tourism promotion versus financing local government services.

Using the study conducted by the U of M as a base, the Montana Travel Promotion Unit (TPU) estimated that Montana should gain an increase in tourism of 6% the first year that the tax revenues are invested in promotion. Ten per cent was projected for the second and third years respectively. This calculates to approximately $28.3 million dollars per year in revenue from pleasure travelers only.

Estimating the total tax revenues at $6 million annually, Gary W. Brester, Department of Agricultural Economics and Economics at Montana State University, reviewed the economic impact of $28.3 million dollars in Montana's economy using Input-Output (I-O) techniques. The sectors affected by the tourists' expenditures were taken from the University of Montana's study mentioned above.

The Input-Output Model (MIOM) estimated that the direct, indirect and induced effects of $28.3 million dollars in increased tourism revenue would generate **$18.6** million dollars in Wages, Salaries and Proprietor's Incomes and **1,888** Full-Time Equivalent positions.

The economic impact from spending the tax revenues for repair, maintenance and construction of Montana's infrastructure was also reviewed. The estimated total direct, indirect, and induced impacts to employment and Wages, Salaries and Proprietors' Incomes is **215** Full-Time Equivalent positions and **$6** million dollars respectively.

In both instances, government revenues would also increase. Using the figure of $18.6 million dollars in Wages, Salaries and Proprietors' Incomes from increased tourism, I could project that the State would collect approximately $3.72 million dollars in income taxes and a substantial amount from gasoline taxes, cigarette taxes and additional property taxes. Altogether, the $6 million dollar investment would not only create $28.3 million dollars from tourists and 18.6 million dollars in new jobs, it would nearly generate the $6 million once again in revenues to the State and local governments.

The MIOM estimates that the use of revenue generated by the proposed bed tax for tourism promotion will generate larger total impacts than would using the funds for street repairs, etc. It's noteworthy to add, however, that this result is extremely sensitive to the assumption of increased tourism provided by the TPU and myself. In order to determine the benefits that we can expect from increasing our tourism promotion from its current $1.2 million level to $7.2 million dollars, we talked with Terry Miller, Deputy Director of Travel Alaska. In 1982, Alaska spent approximately $2 million in tourism promotion. In 1983, 1984 and 1985 Alaska"s annual promotion budget increased to an average of approximately $7 million dollars. Terry stated that the total dollars spent by tourists increased from $360 million in 1982 to $700 million in 1985; an increase of nearly 100 per cent! I feel that our estimate of 26 percent in three years is not only realistic, but actually conservative.

In summary, the Montana Innkeepers Association will support the introduction of a bill to impose a four percent tourism promotion tax. We ask that our legislators protect this bill as written, and join with us to invest in Montana's economic success.

HOTEL/MOTEL TAXES

4. If Montana imposes a statewide hotel/motel tax, how should the revenue be used?

HERBERT LEUPRECHT– CHAIRMAN OF THE BOARD, MONTANA INNKEEPERS ASSOCIATION:

The Montana Innkeepers Association voted to endorse the Tourism Advisory Council's recommendation that the State adopt a 4 percent statewide tourism promotion tax. This decision was made during the 1986 annual convention, held in Billings, on October 20.

For the past few years, Montana's tourism promotion budget has been approximately 1.5 million dollars per year. This is among the lowest in the nation on the rate of expenditure spent for development of tourism. It seems the only growth in Montana is through the service industries. Tourism is the second leading employer and we haven't begun to tap our natural beauty and resources. The members of the Montana Innkeepers Association have decided that it's time to take a vigorous approach by providing funds to make Montana the number one attraction in the Northwest.

This tourism promotion money would be collected from room revenues from hotels, motels, dude ranches, campgrounds and school dormitories when rented to people other than students. The innkeeper's support to tax their own industry is strongly prefaced with spending guidelines, however. Our members plan to be instrumental in developing the final bill that will be presented to the legislators in January. These funds will be earmarked strictly for tourism promotion! It has been discussed that perhaps 75% of the money will be used on a statewide level, with 25% returned to local communities for tourism promotion on an individual citywide basis. Any deviation from this plan to spend 100% of the funds to promote tourism in Montana will cause the Montana Innkeepers Association to revoke their support of this action.

Results of a study conducted by the Directors of the Montana Innkeepers Association suggest that this tax would raise between 4.5 and 7 million dollars annually. With this budget we will be able to offset our current low awareness levels by potential travelers about Montana as a vacation destination.

The Montana Travel Promotion Unit has initiated many projects to accomplish this goal. These current projects are operated on a bare bones budget, however, and our primary goal is to provide the funds needed. Improved tourism throughout our State would improve state and local economies through increased generated dollars.

REBUTTAL BY ALEC HANSEN–EXECUTIVE DIRECTOR, MONTANA LEAGUE OF CITIES & TOWNS:

Cities and towns believe a statewide accommodations tax can be an important part of an overall plan to diversify the structure of government finance in this state. In the recent election, the voters delivered a message. They said that property taxes have reached the limit of public acceptance, and they are demanding relief.

There are two ways to reduce property tax rates. The first is to cut spending. Cities and towns have effectively applied this option in the last 10 years by limiting tax increases to less than 50 percent of the rate of inflation. The second way to reduce mill levies is to diversify and broaden the tax base. A statewide hotel/motel tax would accomplish this purpose. The fiscal note on a bill introduced in the 1985 legislature estimated that a five percent accommodations tax would generate about $7.5-million per year. If these funds were distributed to cities and counties they could be used to replace property taxes.

A portion of the proceeds from a hotel/motel tax should be used to finance travel promotion, but the "all or nothing" position of the innkeepers association is not fair to property owners in this state. The travel industry needs community services like police and fire protection, streets and roads, libraries, arenas, parks and recreation programs. Presently, these services and facilities are financed by local property taxpayers. If cities and counties received a fair share of the proposed accommodations tax, tourists would be paying for some of these services, which would reduce the costs for local property owners.

The message from the voters to the 1987 legislature is simple and direct—" Do something about property taxes". An accommodations tax, shared with local governments, can be one of the answers to this challenge.

UNITARY TAXATION

5. Should Montana's method of unitary taxation be repealed?

FORREST BOLES–PRESIDENT, MONTANA CHAMBER OF COMMERCE:

For the purposes of this discussion the unitary method will be referred to as "the unitary tax" even though it isn't technically a tax but rather a method of taxing corporations. The unitary tax is used by Montana to calculate the Montana share of the income earned by multi-state and multi-national corporations. There are two parts to the method and the first part is apportionment. Apportionment is the assigment of multi-state and multi-national corporate income to states by the use of a formula. Montana uses a three-factor formula of property, payroll and sales. The formula works as follows:

$$\text{Montana's Percentage of a Corporation's Business} = \frac{\frac{\text{MT Sales}}{\text{All Sales}} + \frac{\text{MT Property}}{\text{All Property}} + \frac{\text{MT Payroll}}{\text{All Payroll}}}{3}$$

This calculation produces the apportionment factor. Using this factor, a corporation's taxable income is computed as follows:

$$\text{Montana Taxable Income} = \text{Apportionment Factor} \times \text{Total Corporate Income}$$

The second part of the method is the combined reporting of the income of corporations who are affiliated through stock ownership and interrelated operations. A combined report is used when a group of jointly owned and operated corporations are sufficiently related so that the operation of one part is dependent on and contributes to another part of the group. In that case, the corporations are considered a "unitary business" and, the Montana share of the income of the entire group is calculated using the three-factor formula.

WORLDWIDE AND DOMESTIC UNITARY METHOD

Montana is only one of three states (the other two being North Dakota and Alaska) which still applies the worldwide combination of the unitary tax. California is currently in the process of dismantling their unitary method.

Approximately 20 other states apply some method of unitary taxation on a domestic basis. The apportionment and percentage formulas described above are used to compute the Montana share of those operations within the United States. This is commonly known as the "water's edge" method of unitary taxation.

APPLICATION OF THE UNITARY METHOD IN MONTANA

As mentioned earlier, Montana is almost by itself in still applying the worldwide combination and using all operations of a company operating in Montana, both domestic and foreign, to compute the Montana share of taxes. Montana applies this worldwide combination, however, only on domestic companies. Foreign parent companies, even though they may do business all across the United States, are taxed only on a direct basis through subsidiaries that are located in Montana. This is done through administrative rules applied by the Department of Revenue.

REASONS FOR ELIMINATING THE UNITARY METHOD OF TAXATION

1. The unitary tax is applied unfairly in Montana. As described above, foreign parent companies are given an advantage over domestically based companies in the application and collection of the unitary tax. This has been done by the administration and is a conscious effort on their part to respond to the criticism from foreign investors of the unitary method. The Governor proposed, in the last session, an amendment to a comprehensive piece of legislation that would make what is now being done by administrative procedure part of the law. This is a stop-gap and unacceptable approach to the business community.
2. The fact that the unitary tax is on the books regardless of how it is applied is a very strong deterrent to investment in Montana economic development projects from domestic and foreign sources. Many domestic companies "red line" any state with the unitary tax when they are considering plant expansion or new plant location. Proctor & Gamble is one of those companies and has made several public statements to that effect.
3. Foreign based companies are even more adamant in their refusal to invest in operations in states with the unitary tax. During the last trade mission to Japan, and in personal meetings with trade representatives of foreign countries, it has been made very clear that the unitary tax deters investment from those countries. Even though the administration points out to them that the unitary tax is not applied to foreign parent companies, they will not believe that, after establishing themselves in Montana, that it might not be applied.
4. There are national ramifications in this issue. England has threatened retaliatory action against companies doing business in their country who also do business in unitary tax states. This has focused national attention on the issue and there is a proposal in the U.S. Congress to prohibit application of the unitary tax by individual states. Senator Baucus, who has been a champion of state's rights, has recently made a public statement that perhaps the unitary tax is not worth the trouble that it causes. The debate over the unitary tax may become moot if the federal government acts on this proposal.

OBSERVATIONS ON CHANCES FOR REPEAL

1. The Montana Department of Revenue has stated in previous hearings on this issue that the impact of repeal would be a $10 million shortfall in revenue to the state of Montana. Those involved in seeking repeal doubt that figure and estimate that it is probably less than one third that amount. Nevertheless, the 1987 legislative session will be hard pressed to find revenue to meet the budget so, if repeal is to be accomplished, some compromise method of replacing the revenue may have to be found.
2. Many of those supporting repeal of the unitary tax also would seek total repeal, not just the "water's edge" concept described above. Total repeal is probably an unrealistic goal for 1987 given the revenue shortfall that the upcoming session is facing.
3. The Montana Chamber of Commerce is forming a broad-based task force to support a water's edge repeal of the unitary tax. Significant commitments of funding have been obtained for drafting the proposed legislation and providing technical expertise for educational purposes.
4. Over the last two years, the Montana Chamber of Commerce has made this issue a major part of two separate series of meetings held around the state to help familiarize the business community with the workings of the unitary tax and the need for its repeal. This has resulted in significant editorial support from major newspapers across the state. The Republican party has made repeal of the unitary tax one of its platform planks; the Democrats, on the other hand, seem to be supporting Governor Schwinder's exemption of foreign parent companies only. Obviously, the politicizing of the issue makes passage of repeal dependent in large part on the political makeup of the 1987 legislative body. Regardless of all that, however, repeal of the unitary tax will be no small chore but repeal is vital to the future of economic development in Montana.

REBUTTAL BY JOHN LAFAVER–DIRECTOR OF REVENUE, STATE OF MONTANA:

Mr. Boles advocates a tax system that would work much like a United Way campaign. He would simply ask major international corporations to pay whatever their accountants think is a "fair share". In the process Mr. Boles would unfairly shift millions of dollars of taxes to Montana firms while providing tax incentives to invest overseas.

The "water's edge" plan advocated by Mr. Boles in the 1985 Legislature would have encouraged firms to invest in foreign tax havens, channel profits actually earned in Montana through them, and escape their legitimate Montana tax responsibilities.

Both Mr. Boles and I agree that our approach to unitary be changed. I advocate a change that will ensure equity between Montana and out-of-state corporations while providing specific incentives to invest in Montana.

Mr. Boles advocates a plan that encourages international firms to evade their legitimate tax responsibilities. It will provide tax relief for international firms at the expense of Montana businesses.

UNITARY TAXATION

5. Should Montana's method of unitary taxation be repeated?

JOHN LaFAVER–DIRECTOR OF REVENUE, STATE OF MONTANA:

The question is not what should be repealed, but what should be retained. How can we fairly tax interstate/international firms on the portion of business they do in Montana if we do not use the unitary method?

The present method of objectively determining Montana's fair share of multinationals' income is fair and cost-effective. It assures that the multinationals pay tax on the same basis as Montana's mainstreet businesses. At the same time, we recognize the multinationals have won a series of political battles in other states in repealing some versions of unitary. The results jeopardize our ability to fairly tax the large firms. How do we continue to insure that multinationals pay their fair share?

Unlike other unitary states, Montana has already limited its use of unitary; Montana does not apply unitary to foreign parent corporations. Concern is sometimes expressed that Japanese firms will not invest in Montana because of the unitary method. That perception is unfortunate because the method does not apply to Japanese parent corporations.

In the 1985 Session, Sen. Mike Halligan proposed that the "foreign parent exclusion," now administrative practice, be clearly stated in the law to help correct any misperception on the part of foreign firms. The "Halligan Amendment" is one way to address the unitary issue.

We might also consider adopting some features of unitary legislation recently enacted in California. That legislation allows corporations to choose a "water's edge" unitary method under certain conditions that prevent them from hiding income overseas or gaining a tax break at the expense of small business. The legislation also includes incentives for investing in California instead of investing overseas.

Montana needs to respond positively to legitimate complaints of large corporations while insuring that the tax burden is not shifted unfairly to the small businesses that are the dynamic, job creating backbone of our economy. Montana should not adopt a type of "water's edge" taxing method that provides an incentive for large corporations to shift even more operations overseas. Any incentives that are adopted should be for investing in Montana, not for investing outside the United States.

I believe that the controversy about unitary can be resolved if we keep in mind our two objectives: fairness for all taxpayers and growth for the Montana economy. Proposed changes in the unitary method should be measured against those objectives.

REBUTTAL BY FORREST BOLES–PRESIDENT, MONTANA CHAMBER OF COMMERCE:

Mr. LaFaber's statement implies that somehow large corporations will escape taxation if the "water's edge" method is put in place. Since this proposal would leave in place the domestic application of the unitary method, the Revenue Department's concerns are not well-founded. The fact is that the National Federation of Independent Business and retailers generally do not oppose repeal of the international application of the unitary tax.

It has become apparent that the California version of repeal is not working well. Montana would be much better served by adopting repeal legislation patterned after our neighboring state of Idaho or that which will be considered in our neighboring state of North Dakota.

The Montana Department of Revenue seems bent on making this a "big" versus "small" issue when it is not. There is no doubt that encouraging investment in Montana by repeal will, in the long run, greatly benefit the mainstreet business that the Revenue Department purports to support.

PROPERTY TAXES

6. What changes should be made in the Montana Property Tax System?

GARY BUCHANAN—Montrec: "There is a basic structural problem in Montana's method of financing local government and education. Heavy spending requirements are loaded on a narrow property tax base, and the entire system is out of balance and riddled with inequities." - **Montana League of Cities and Towns, 1985**

"Property tax rates have reached the limits of public acceptance and common sense. The system is breaking down and the time has come to build a tax structure that guarantees a fair deal to all Montanans." - **Montana League of Cities and Towns, 1985**

The above quotes are not from tax protestors from the Bitterroot or anywhere else in Montana. They are responsible comments from responsible local officials in a report written last year. We must remind ourselves in the current hysteria and frenzy around Initiative 27 that the status quo doesn't work either. I am unalterably opposed to I-27. The Montana Tax Reform Education Committee, which I co-chair, was one of the earliest opponents of this reckless proposal. But something is really lost in the current debate.

Too many opponents of I-27 are sounding like guardians of the status quo. It's time to focus on the real issue—the need for fundamental tax reform. Every politician running for office this year should be asked what his or her plan is for solving the revenue crisis and improving the economy. Political parties should be providing leadership on these issues instead of waiting for the opposite party to make a mistake.

We have some obvious problems and it's time to solve them. The Advisory Commission on Intergovernmental Relations in its most recent report card nearly failed us. It rated us 46th in its final report, 43rd in business climate and 47th or nearly last in terms of balance. The League of Cities reports that Montana's dependence on property taxes is 65 percent higher than the western states and 48 percent above the national average.

Study after study points to the problem. Our tax system is not only out of balance and often negative for business, but in 1986 does not raise the necessary revenue to finance our education system and local government. The status quo will not work.

The 1985 Legislature turned down a proposal to study tax reform and walked into the emergency special session last summer totally unprepared to deal with a $100 million deficit.

They walked away only after applying bandages, tourniquets and compresses to a hemorrhaging system. Again, fundamental reform was not discussed.

The Montana Tax Reform Education Committee was formed, in part, because of frustration with the lack of leadership on tax and revenue issues. MONTREC is a bipartisan and voluntary effort aimed at provoking debate on these critical issues. It is a pro-local government, pro-education, pro-business group dedicated to bringing balance and fairness to the Montana tax system.

Let's focus the attention briefly on what is a balanced system. The ACIR in its report "Characteristics of a High Quality State Local System says that a state system should be "balanced," broadly based, equitable, revenue adequate, simple and stable." Stack our current system up against those criteria!

A balanced system, the ACIR says, should be 20 to 30 percent reliant on income tax, 20 to 30 percent reliant on property tax (compare that to Montana's 48.3 percent) and 20 to 30 percent reliant on sales tax. We, of course, have no sales tax.

Balance again is the critical ingredient, and we know we were rated 47th nationally on that factor.

Members of the MONTREC are supportive of a number of options as long as they reduce our reliance on property tax and improve the balance. Some of our members support local option taxes. Others support reforms in the income tax. Many, including myself, support a sales tax, again only if it is tied to substantial property tax relief and exempts unprepared food and pharmaceuticals. Although we may have different solutions, we are united in a few key areas:

1. THE SYSTEM is unbalanced and overreliant on property tax and requires some tough political solutions to fix it.

2. OUR ORGANIZATION is determined to bring these controversial issues out of the closet and on to the table.

3. THE LEGISLATURE has been unable to effectively tackle these issues and needs to be pushed to take leadership.

Legislative Initiative 105 was designed to force the Montana Legislature to take action. It recognizes that legislators cannot walk away again without dealing with tax reform.

Initiative 105 is simple and straight forward. Its preamble reads as follows: "The purpose of this initiative is to send a message to the Legislature that the voters of the state of Montana are overburdened and that the Legislature has failed to carry out its responsibility to develop a tax system which is fair to both taxpayers and local property taxing jurisdictions. Further, the initiative would limit future property taxes to the amount levied in 1986, but gives the Legislature the authority to enact a law to reduce property taxes and to provide an alternative revenue source to the local taxing jurisdictions. If the Legislature acts, then the initiative will not become effective." Initiative 105 would limit certain property taxes to 1986 levels if the 1987 Legislature fails to reduce most classes of property taxes in the state and provide alternative revenue sources for local governments and schools.

The classes of property include: 1) agricultural land including improvements; 2) residential, trailer, mobile home and commercial real property including improvements (Main Street business); 3) livestock and unprocessed agricultural products on the farm and in storage; 4) personal property, furniture and fixtures used in business.

Initiative 105 is a legislative initiative intended to get the ball rolling on tax reform. It is essentially a bill from the streets instead of from the floors of the House or Senate. Like other pieces of legislation, there will probably be numerous amendments added later or legislative proposals for modification as it moves through the Legislature. MONTREC intends to be pragmatic, constructive and flexible on that score as long as true reform and property tax relief are the outcome. One of the reasons I-105 enjoys such broad support has been our willingness to consult with local governments and education entities. We also have modified our positions in the past in order to be reasonable. We intend to maintain that course.

I-105 is a moderate constructive approach towards tax reform. It is the logical compromise in the current great debate on property taxes. It will force our legislators to make decisions and confront problems they've been ducking for sessions. More than anything, it will move the fierce debate to where it should be—the floor of the 1987 Montana Legislature.

REBUTTAL BY SENATOR FRED VAN VALKENBURG—Missoula:

As of this writing, Gary Buchanan and the MONTREC committee have accomplished the first step in their goal of tax reform with the passage of I-105. Unfortunately, the MONTREC folks don't seem to have any concrete idea of where to go from here. In addition, I-105 is so poorly drafted and ill-conceived that, if it is not substantially amended or repealed, Montanans may be stuck with atrocious property tax inequities.

Mr. Buchanan states that a general sales tax which is used to fund substantial property tax relief is **his** personal choice as the appropriate reform of our property tax system. Beyond that we are offered no specifics. We don't know the level of sales tax proposed; the amount of property tax relief to be provided; the manner in which the relief is to be provided; whether all classes of property are to benefit equally from the replacement of revenue (even though many will contribute little if any toward a sales tax); whether the people should be allowed to vote on the issue; or how the level of the sales tax will be controlled in the future. Perhaps the MONTREC backers can now see why even they cannot agree on a sales tax, let alone the legislature.

The Legislature has gotten the **message.** Substantial property tax reform is possible. Blind faith in a general sales tax, which over 40% of Montana voters strongly oppose, may derail legitimate property tax reform. Hopefully, those who really want property tax reform are not wedded to a general sales tax.

PROPERTY TAXES

6. What changes should be made in the Montana Property Tax System?

SENATOR FRED VAN VALKENBURG —Missoula:

Montana's property tax system suffers from a number of serious problems. Chief among these is a fairly widespread lack of public acceptance of the existing system. No one expects any tax system to be popular. However, public acceptance of a broad based tax, such as Montana's property tax, is essential to maintain an orderly governmental environment and to promote economic growth. Public acceptance will be by no means easy to accomplish and any change, let alone substantial change, is fraught with political and economic risk. It is my belief though, that substantial change is the key to public acceptance. Of course, I do not propose change solely for the sake of change, but rather because I believe that these changes will find widespread public acceptance and bring about the orderly government and economic growth that is esssential to our future. Even if the proposed changes do not meet widespread public acceptance, I believe that they are sure to spark the necessary public debate over the property tax system that will produce changes which will find widespread public acceptance.

Problems With Existing Law

There are two serious problems with the existing property tax system. First, we have at present nineteen taxable classifications of property. Almost all of these have different tax rates. Even worse, it is virtually impossible to justify the application of different tax rates except to say that "it's always been done that way." The inequitable treatment of business property abounds. To a lesser degree the taxation of minerals and agricultural property varies substantially according to the nature of the property. Finally, urban and suburban property can be treated quite differently depending on the size and potential use of the suburban land even though it differs little in actual use.

The second problem stems from our constitutional requirement that the property tax be administered by state government and that all property be appraised by the state in order to equalize valuation. The involvement of state government in the valuation process is greatly resented, overly expensive, and with some constitutional and statutory changes, to a large degree unnecessary. The property tax is principally used to support public schools and local government. The main reason statewide administration and equalization of the propety tax is necessary is because of the mandatory 45 mill levy for the public schools and the 6 mill levy for the University System. If replacement revenue for these levies could be found, it may be possible to eliminate these levies and with them, much of the costs incurred by the state in the administration of the property tax. A property tax system administered primarily at the local level is much more likely to be responsive to legitimate concerns and thereby more likely to enjoy public acceptance.

Proposals

1. Amend the state constitution to eliminate most state administration and equalization of the property tax. Centrally assessed property should continue to be administered by the state. This includes most utility and railroad property.

2. Reduce property tax mill levies by at least 51 mills statewide with the elimination of the mandatory public school levy and university system levy. Replace funding for public schools and the university system with other revenue, thereby balancing Montana's overall tax system. The principle source of new revenue should come from an appropriate tax on minerals so that mineral rich areas do not reap an undue windfall from the elimination of statewide levies.

3. Reduce the number of taxable classifications of property as much as possible. If possible, there should be only four classifications: residential, commercial, agricultural, and mineral. Once an appropriate tax rate in each classification has been determined, it may be appropriate to put that rate in the constitution to guarantee that it won't be raised.

4. Investigate and implement, if appropriate, changes in the appraisal of residential property and the collection of such taxes. Most people are honest and willing to pay their property taxes. Some, because of age, loss of employment, or other legitimate reasons lack the ability to pay. Delayed collection under such circumstances until the property is sold or transferred may be a way to alleviate these problems without taking the property in a tax sale.

In addition, self appraisal of residential property has the potential to work and should be tried on an experimental basis.

Most of these proposals may need refinement, will take a fair amount of time to bring about, and may need to be phased-in due to the substantial change from existing law. However, if we could make these changes, I believe we would have a much reduced, fairer, localized, and, consequently, much more widely accepted property tax.

REBUTTAL BY GARY BUCHANAN—MONTREC:

The Montana Tax Reform Education Committee was formed over a year ago to promote debate and reform of Montana's tax and revenue system. MONTREC was formed in part because of legislative inaction on the tough issues of taxes and government expenditures.

When we started, tax reform was not at the top of the political agenda. It now is, thanks to our own I-105 and the near passage of CI-27. It is also at the top of the agenda because of now widespread realization that the status quo does not work and major changes are in order.

Some people are asking what's the message behind I-105? As the sponsors we thought we would restate our fundamental theme and objectives.

There are four fundamentals: I) Reduction of Government Expenditures, II) Substantive Property Tax Relief, III) Alternative Revenue Sources to Replace Property Tax, IV) The Development of a Balanced Tax System.

Let's go through these fundamentals: I) **Reduction of Government Expenditures.** Montana has an overbuilt, over-administered governmental system. Our declining population of 826,000 people is about the same size as an intermediate sized American city, but look at what we attempt to support. 56 counties, 127 cities, 19 judicial districts, 6 separate universities, and community college system, (with declining enrollments). Just at the county level we pay for over 600 elected officials. We've built a service structure too large for our revenue base and it's time to fix it. The legislature must deal with government consolidation at the State, County, City and University level. Controlling expenditures must remain the highest priority.

II. **Substantive Property Tax Relief.** The legislature clearly must deal with the property tax rebellion. CI-27 and I-105 were just two symptoms of a tax system that is flawed and not working. The reappraisal system is a debacle and aggravated the current situation. Further, a revised I-27 will pass the next time around if the legislature does not act. Legislative proposals to duck issues and send them back to the initiative or referendum process are an abdication of responsibility and merely "political ping-pong". We expect and pay legislators to act and now is the time to solve these severe problems during the 1987 session. I-105 will freeze taxes in certain classes only if the legislature does not act to lower them. A cosmetic response will only backfire.

III. **Alternative Revenue Sources to Property Taxes.** We think the legislative history in support of local governments is dismal. As the League of Cities and Towns said in 1985, "There is a basic structural problem in Montana's method of financing local government and education. Heavy spending requirements are locked on a narrow property tax base and the entire system is out of balance and riddled with inequities." The 1987 legislature must reverse and discontinue its practice of balancing the budget crisis on the backs of local government. Local government must be given meaningful not cosmetic revenue alternatives to the property tax.

IV. **The Development of a Balanced Tax System.** The lack of balance of Montana's tax system was made clear by the Advisory Council on Intergovernmental Relations September 1985 study. Montana was ranked 46th in the study's "First Report Card" 43rd in Business Climate and 47th or nearly last in balance of our tax system. We are concerned with this lack of balance and our overbalance on residential and business property taxes to fund public services. We applaud the Montana Forward study and agree with their concern regarding "personal property taxes." **Conclusion:** Study after study points to the problem. Our tax system is not only out of balance and often negative for business and economic development, but in 1986 does not raise the necessary revenue for fundamental public services. Fundamental tax reform is essential, not bandages, tourniquets, and compresses like the actions of the last special session. The 1987 legislature must act on its own because that's why we elect senators and house members. Legislative actions to duck the issue and simply refer solutions back to the initiative process are unacceptable. That's what I-105 is about. It is a purposely general yet firm and constructive message to prompt the legislature towards leadership.

INCOME TAX

7. What changes should be made in the Montana income tax system?

REPRESENTATIVE GERRY DEVLIN–Terry:

With the new Federal Tax Reform Act, it is evident that Montana will receive a windfall in additional revenues from state income taxes. If the 1987 Legislature does not make some adjustments, this windfall could be as high as 20 million dollars. This windfall to the state is caused by Federal changes that in effect increases the amount of taxable income subject to state income taxes. Changes in capital gains, two-earner deductions, income averaging, and a myriad of other adjustments in the Federal Act will most certainly add to taxable income in this state. The 1987 Legislature should make the necessary changes in the state tax codes so that this windfall does not occur.

At present, our state income tax codes follow the Federal codes in part, but deviate in several areas; this not only causes the taxpayer to file a somewhat lengthy state tax return, but also creates confusion. The rate of tax imposed on taxable income is also cumbersome when you start with 2 percent on the first $1000, 3 percent on the next $1000, 4 percent on the next $2000, and on and on to 11 percent on the highest bracket. In every legislative session there are proposals brought out to deviate from the Federal codes; those that are enacted into law add more paperwork and higher preparation costs to the taxpayer.

One of the simpler ways to address Montana income tax reform would be to go to a flat rate system. Under this system, the taxpayer would pay the state a flat percentage of what he paid in Federal income taxes. This could be enacted by the Legislature so as not to add an additional tax burden on the state taxpayer. Several states have this system in place and several others are considering changing to it.

The income taxpayer in Montana had better be vigilant regarding tax increases proposed in the next legislative session. The administration has already started laying the groundwork to convince people that their taxes are really far below the national average. Through a series of graphs, numbers and charts produced by the Department of Revenue and released last month, it is clear that this administration will propose increasing state income taxes. When those graphs and charts depict the Montana income taxpayer as being taxed third lowest in the United States, the conclusion most definitely points to an income tax increase.

REBUTTAL BY SENATOR BILL NORMAN–Missoula:

It is agreed that the Federal Tax Reform Act will provide additional income tax revenue to the state of Montana, if the legislature does not act. To refer to this additional income as, "tax windfall", closes off argument as to why the state should keep all, or some, of the increased revenue. But the arguments remain. The Feds are pulling funds from many programs. To the degree these programs are necessary for Montana, the means of funding them must be replaced. This is a good source of revenue by which to replace the lost funds. Further, there will be a large state deficit. What is to be done? We can not ignore the deficit.

To tie tightly the state income tax to the Federal tax is simple and sometimes desirable, sometimes not. The Federal income tax is in a constant state of change. To permit the Feds to decrease or increase Montana's income tax is not in the best interest of the state of Montana.

Calculating Montana tax separately from the Federal tax is an annoyance, but to turn the matter over to Congress would, indeed, be a very high price to pay to avoid some paperwork. States that closely follow the Federal Codes are sometimes unpleasantly surprised.

As to the graphs, charts, statistics, estimates and projections, there is little to say. The blizzard is upon us. The more uncertainty, the heavier the blizzard. Little confidence should be placed in such speculation. A case in point is OPEC. Surely OPEC could have obtained the most reliable figures available. The figures were worthless. The fall in oil prices came as a nasty and unpredictable turn of events. Economic forecasts are helpful, but not very. It is sort of a status symbol. Everyone must have their own. The game can have as many players as you like.

INCOME TAX

7. What changes should be made in the Montana income tax system?

SENATOR BILL NORMAN—Missoula:

The question posed relates to the Montana income tax system. This can not, of course, be considered without general consideration of taxes. The following observations regarding Montana income tax may be helpful.

The changes in the Federal income tax will have a substantial effect on the Montana income tax returns. Estimates are not precise yet but 20 to 35 million a year is the range of speculation. If nothing is done, this increase revenue will accrue and appear in the 1987-89 state revenues. Surely this will not escape the notice of the Legislature. Proposals will be forthcoming. We can do nothing and the state income will increase. We can amend the present income tax statues so the taxpayer gets the entire amount. We can change the statues so the taxpayer gets a portion of the benefit and the state a portion. Montana income tax is often referred to as being "piggy-backed" on the Federal returns. As Federal tax structure changes, so does the state. Now the reverse occurs, the Federal tax goes down and the state tax goes up. This phenomenon probably was not anticipated over the years as Montana statues were written to approximate the rise in Federal income tax.

The steady decline in Federal support for education, welfare, highways and other federally assisted programs, evermore the costs shift to the state and local government. So the argument is put forth that states can not pick up the Federal burden.

The state does not have a printing press to make money. The counter argument is that government is a necessity and we cannot just refuse to fund government. Here, then, is a golden opportunity to obtain state revenue that people were paying anyway. They are now paying the state instead of the feds since the state must now assume the burden.

A second feature of the current income tax reform is the 11% rate. This is cited as the highest of surrounding states and bad public relations. If we are to polish the image of "a good business climate", this should be changed. As always, a good business climate is not defined but we could easily change the 11% to 10% or even 9%. The high income taxpayer would, of course, not escape taxes entirely and would be paying say 10%. The rest of the taxpayers would make up the difference, but the amount would be negligible. Thus a good business climate would be restored.

Montana income tax is indexed. This means inflation would not automatically drive taxpayers into a higher tax bracket. It has been very costly for state revenue but it would be most difficult, and probably futile, to attempt to eliminate indexing now.

It is alleged that many large loopholes exist. Taxpayers with enormous income are paying little or no taxes. This has become so scandulous that it has even attracted the interest of the tax reformers in Congress. This is indicated in recent federal tax reform, especially corporate income tax reform. It may be worthwhile to consider this category of income. If the loopholes were closed, it would probably not add greatly to state revenue. It would at least instill in other taxpayers a sense of confidence that all taxpayers are being treated fairly.

Lastly, there is the surtax. Current estimates indicate that there will be a 5 million dollar deficit for the 1987 biennium. If projections mean anything, there will be an additional 100 million deficit for the 1989 biennium. It is always possible to cut spending but it is not reasonable to believe that this large deficit would be made up by cuts alone. To do so might jeopardize some essential government services. So, setting the sales tax aside, there is the question of income tax increase. A surtax has been enacted before. A 40% surtax was levied in 1972. This was gradually reduced to zero. It is not palatable for a legislator, but surely a surtax will be considered, as has been done again and again. Should this surtax be enacted, the percent will depend on the deficit, other taxes, and, of course, the amount of revenue generated by three large sources. These sources are the oil severance tax, interest income on investments and the amount of revenue from the income tax itself.

At this time it is tough to say what should be done to change income tax statutes. Federal income tax reform, the 11% marginal rate for state income tax payers, loopholes, and the surtax are all likely to be considered by the 1987 legislature.

REBUTTAL BY REPRESENTATIVE GERRY DEVLIN—Terry:

Just because Federal support for state and local governments has not continued its skyrocketing increases of the 1970's is little excuse for the state to grab whatever the taxpayer may save due to the Federal Income Tax Reform Act.

State and local governments became addicted to Federal hand-outs through the last decade. They were encouraged to initiate programs that were too good to be true, only to find out later that perhaps the necessity of such programs was questionable. These were high tax revenue days in Montana, and when we only had to put up 10 percent or 25 percent of the monies needed for a program we fell into the trap. Now that the Federal government is finally showing some fiscal restraints we must do the same.

This state cannot continue to support the level of spending encouraged by the Federal government and should not ask the income taxpayer in Montana to give up Federal tax savings so that we can attempt to continue.

Whenever government finds itself in a revenue crunch, the first proposal to come up is the surtax. Instead of taking the time and research needed to change tax codes, it is easier to penalize the taxpayer who is paying his taxes. A 10 percent surtax was removed in 1981 and should not ever appear again. A taxpayer should be penalized for **not** paying taxes due, and should not be penalized for paying taxes on time.

WORKERS' COMPENSATION

8. What changes have been recommended in the Workers' Compensation System by the Advisory Commission?

OVERVIEW FROM THE WORKERS' COMPENSATION ADVISORY COUNCIL REPORT OF JUNE 23, 1986 (JIM CANAN, CHAIRMAN):

The Workers' Compensation Advisory Council established by Governor Ted Schwinden in January, 1985, was given the responsibility of reviewing the provisions of Montana workers" compensation laws and making recommendations for revisions by July 1, 1986. In an opening statement to the Council, Governor Schwinden pointed out that the last major revision of these laws had taken place in the early 1970's. Numerous legislative amendments and court decisions since that time had created a need for this new review of the entire law in order to be sure that the real needs of injured workers were adequately met with the least cost to the employers. In the Governor's words, the Council was asked to be "people sensitive and cost conscious." To accomplish this purpose, the Governor appointed twenty members representing a wide range of groups interested in the system.

In order to develop an agenda of topics for consideration, each member was asked to submit a list of concerns. These lists were then consolidated into consideration categories with specific questions and sub-topics under each category. After lengthy discussions, the Council prepared a preliminary report, setting out for public comment, draft conclusions that were to be included as recommendations for revising existing law.

Copies of that report were widely distributed throughout the state, and in April six public meetings were held in various cities in order to get comments and criticism of the Council's work. In the opinion of the Council members, the public meetings were very successful. There were large turnouts at almost every meeting. The largest group gathered in Kalispell, about 375; and the smallest in Glasgow, about 20. At Billings, Great Falls, Butte, and Missoula the attendance varied between 75 and 150. Most of the speakers were specific and well prepared and many presented written statements of their views. Summaries of the oral testimony and copies of all letters and written statements were sent to all Council members for review before the subsequent Council meetings when the draft report was considered and revised. As a result of this review, a number of changes were made in the Draft recommendations.

The specific recommendations in this report are presented in the form of Draft legislation (Part III). Part II, an analysis of the proposed legislation, indicates the problems identified by the Council and suggests ways these problems can be corrected by specific sections of the Draft Bill. Detailed Minutes of Advisory Council meetings, while not included with this report, are available in the event questions arise later about the Council's intent.

As an aid to Council deliberations, cost estimates on various proposals were obtained from the National Council on Compensation Insurance (NCCI). On the basis of these estimates, the Advisory Council is reasonably convinced that this proposed legislation, if enacted, will result in a minimum 15% reduction in premium rates. A number of proposed changes are difficult to quantify but could increase this estimate significantly. The principal changes recommended by the Council will make it possible to understand and administer the law more easily, reducing the need for litigation and detailed rule making.

In the troublesome and difficult area of permanent partial disability, a clear distinction is proposed between wage loss awards and indemnity-impairment awards. The maximum number of weeks for partial disability is reduced from 500 to 325. This change will result in a reduction in the size of total payouts but will not reduce the present weekly compensation rate.

In the area of permanent total disability (renamed "continuing total disability" to be more accurate), the Council is recommending limited cost-of-living increases. The provisions of SB 281, regarding lump-sum settlements, are substantially modified, and the method of discounting is changed to use the average Treasury bill rate instead of 7%.

Temporary total disability sections are largely unchanged, except for some clarification. The time for beginning wage loss benefits is moved from the first day to the seventh day.

No compensation benefits will be available while a claimant is incarcerated after conviction for a felony.

Death benefits for the surviving spouse who has not remarried will be limited to ten years instead of life; and dependent children can receive benefits only to age 22, instead of 25.

A new provision is added, providing job protection and limited job preference to the injured worker.

Limitations are proposed for the use of funds in the Uninsured Employers Fund since the funding of this program is inadequate to permit full benefits.

The section relating to coverage has been clarified, and the requirements for independent contractors have been tightened.

Provisions establishing criminal penalties for fraudulent claims have been included. The level of proof required for establishing an aggravation of a previous injury, has been raised.

New sections relating to rehabilitation of injured workers have been added. Priorities for retraining are established, and the role of private rehabilitation services are included in the proposed law.

Those sections relating to the Workers' Compensation Court have been revised to improve operations and reduce litigation.

Security requirements have been increased for self-insurers.

This report, and the accompanying legislative recommendations are the result of about seventeen months of intensive and careful deliberation by the Advisory Council in free and open discussions. The recommendations are, in many instances, a compromise between the divergent views and ideas of the members. Like any good compromise, probably no member of the Council is fully satisfied with all of these provisions. However, these proposals must be considered as a total package of recommended actions. The Council realized at an early stage that there were no easy answers or model solutions. Many states have similar problems and are searching for better answers to the complex issues in this field. The proposals in this report will make significant and far-reaching changes in the Montana workers'compensation system. In the opinion of the Council the proposals meet the test of a "people sensitive, cost conscious" program.

WORKERS' COMPENSATION

8. What changes have been recommended in the Workers' Compensation System by the Advisory Commission?

OVERVIEW FROM THE WORKERS' COMPENSATION ADVISORY COUNCIL REPORT OF NOVEMBER 13, 1986 (JIM CANAN, CHAIRMAN):

This report supplements our June 23, 1986 report in which a number of major changes were proposed for revision of the workers' compensation laws for the State of Montana. The Council has now considered the eleven additional questions or issues on which it was felt further study and discussion were required.

Two meetings were held, one in September and one in November of 1986 to discuss reports from subcommittees and the Division staff. Some issues required no further action while others required action but did not require a change in existing law. For the remaining issues, the Council is recommending additional changes in the law and modifying some of the June 1986 recommendations.

Topics are listed in the same order as they appear on page 5 of the June report. Briefly, the recommendations are as follows:

(1.) While no change is required in order to enforce safety requirements, a change is proposed in order to allow carriers to provide some additional incentives for better safety programs.

(2.) It is too early to evaluate the 1985 law which was designed to control rising medical costs, but a change should be made in order to give the Division authority to set hospital rates.

(3.) Hearings on a report of Occupational Disease Medical Panels should begin with the Workers' Compensation Court, rather than the Division of Workers' Compensation. Further studies will be needed before any substantive changes in the Occupational Disease Act are made.

(4.) When a subsequent injury occurs to the same part of the body, a change is proposed which would limit the entitlement of the injured worker to the additional disability above that for which previous payment has been made. Because this is a further reduction in existing benefits, the Council is also modifying its previous recommendation and increasing the maximum number of weeks for permanent partial disability from 325 to 350 weeks.

(5.) Since the Division of Workers' Compensation, under existing authority,is proposing new limitations on attorney fees, no recommendations are made by the Council.

(6.) A majority of the Council feels that the "liberal construction" clause in the present law should be replaced with new language intending that the law be construed according to its terms.

(7.) Deductible insurance plans should be authorized on an optional basis without reducing any liability of the insurer or employer.

(8.) No recommendations were adopted on the subject of further reductions in the cost of temporary total disability. The Council encouraged further discussions between the Division of Workers' Compensation and the Department of Social and Rehabilitation Services.

(9.) Since new requirements are being developed for reciprocity and extraterritorial agreements, no further Council action is needed.

(10.) No change is proposed in the current definition of "wages."

(11.) A recommendation is being made to allow insurers to deny liability if it can demonstrate that the injured worker was under the influence of alcohol or drugs at the time of the accident. However, if the accident occurred for reasons totally beyond the control of the intoxicated worker, the insurer would still assume liability. A new definition of travel status is also proposed.

In addition to these questions, two other actions were taken by the Council at the November 12 meeting. After consideration of the proposal to replace the Workers' Compensation Court with an administrative hearings panel, the Council voted 6 to 5 to reaffirm its support for retaining the Court.

The Council also voted to reconsider a previously defeated motion regarding separation of the State Compensation Insurance Fund from the Division of Workers' Compensation. By an 8 to 1 vote, with two abstentions, the recommendation to separate the Fund was approved.

Editor's Note:

This issue is the only one that we address which has no opposing commentary. There is no opposing commentary presented because the consensus of opinion is that Workers' Compensatioun needs to be changed. Since the Workers' Compensation Advisory Commission has been reviewing various aspects of Workers' Compensation, and has public input, we asked Mr. Jim Canan, it's chairman, to respond. We realize that the positions they have taken are limited in scope and may represent compromise within their group.

The Chamber of Commerce recognizes the need for a Workers' Compensation System to protect the security of injured workers and their families. Similarly, the Chamber of Commerce commends the Advisory Council for recommending changes to the Workers' Compensation System which will reduce costs and make the system more efficient.

The Chamber of Commerce, however, suggests that the Advisory Council continue its evaluation of the system in order to cut costs and to further ease the burden of the system on employers. The Chamber believes further reductions in premium costs are necessary to make Montana competitive with other states.

We see this Commission Report as a realistic starting point from which a more extensive program to update Workers' Compensation will emerg

LIMITS ON LIABILITY

9. Should the legislature establish limits on liability?

DONALD MOLLOY—Billings:

The Legislature should not protect wrongdoers. "Propaganda is the art of the persuading others of what one does not believe oneself."[1] The proponents of limiting an innocent victim's right to full legal redress are not the catastrophically injured. Nor are they the families whose lives have been devastated by the loss or injury. The masters of this orchestrated propaganda campaign to limit victim's rights want the issue decided by generalizations, expressed in terms of emotion. To get at the truth, omit the emotion and ask what the generalizations are and how far they are confirmed by fact. "Should the legislature establish limits on liability?" No! But before answering, each Legislator must ask: "Who wants me to take away a Montana citizen's rights? Why will it benefit our state or its citizens to arbitrarily limit the right to recover?" Legislation to limit damages takes away rights that have been a part of the Constitution for at least a century in this state. It obviates common law principles that have developed in this country for over two centuries.

The campaign that resulted in statutes limiting damages elsewhere, was plotted under the guise of a "liability insurance crises". Yet, experience has shown that there has been no effect either on available insurance or the cost of insurance when damage limits are enacted. Indeed, at the special session of the Montana Legislature in March 1986, insurance industry spokesmen stated that legislation limiting damages: (1) would not make insurance more available; (2) would not make available insurance less costly; and (3) it would be nearly a decade before there might be some expectation of judging the consequences of damage limits.

There is not a flood of litigation in Montana. The National Conference of Local Courts, has documented the cases filed in various states including Montana from 1981 to 1984. In Montana, during that time, the population grew by 4%. Yet, the actual number of civil lawsuits filed has decreased by 16%. "The explosion in liability lawsuits is nothing but a myth."[2]

Indictments are continually made that this "liability crisis" is caused by the non-existent litigation explosion and outlandish jury awards. These accusations demean the function of courts and juries. The Rand Corporation Institute for Civil Justice research found that "Juries are usually sensible and decisions have been remarkably stable over 20 years."[3]

Damage limits single out the catastrophically injured. Only about 12% of all lawsuits are personal injury actions. Of these, more than 90% are settled before trial. When cases are tried, nearly 90% result in a verdict or a judgment of less than $50,000. Many times the injured party gets nothing.[4] This means that caps on damages are likely to affect very few cases. Consequently, any arbitrary limit on damages will only affect a very few in Montana. But, of those people affected, it will be the most seriously injured, the catastrophically injured victim and his family.

An arbitrary limit on the right to recover, does not mean the damage hasn't occurred. Nor does it mean the cost of the loss will not be paid. What arbitrary limits on the right to recover do mean is that the person at fault will not have to pay the full extent of the loss he caused. Who pays the balance of the loss? The taxpayer.

The Legislature cannot legislate away crime or criminal conduct that injures innocent victims. It can try and protect **innocent victims** from criminal wrongdoing.

Likewise, the Legislature cannot legislate away the pain and agony or the loss suffered by **innocent victims** and their families, people whose lives have been permanently altered by some other persons' wrongdoing. Why should the Legislature **protect** the innocent victim of crime and **punish** the innocent victim of civil wrongdoing by limiting his right to recover? Put another way, why should the Legislature protect a civil wrongdoer when it is a recognized social benefit to punish the criminal wrongdoer? It makes no sense to protect a wrongdoer, civil or criminal. Damage limits protect a wrongdoer at the expense of the innocent victim and society. Any limit on the ability of persons injured through the neglect or fault of another to recover the full extent of their damages, undermines public interest. Such limitations are not an effective way of influencing the availability or cost of insurance. Anything this Legislature does in terms of protecting civil wrongdoers, is not going to effect insurance. Even if it would, there are serious questions of whether punative savings in premiums would justify providing less than full compensation for an arbitrarily selected class of persons made up primarily of the most seriously injured.

Caps on recovery do not limit the damages suffered. Caps on recoveries reduce the severity of payments on claims. The beneficiary is an insurance industry, not Montana citizens and not Montana businessmen.

The tort system presently provides successful claimants with **the right to seek** adequate compensation for their injuries. A limit on damages takes away that right and passes the burden from the wrongdoer either to the catastrophically injured, to the innocent injured, or to the taxpayer because the damages and losses are real even if they are not compensated.

The Law of Personal Injury is a system that is based upon the notion that every individual who suffers injuries caused by the wrongful acts of another is entitled to bring a claim to court, to have the claim heard and ruled on after a trial before a jury of fellow Montana citizens, and to be awarded the proven damages necessary to provide full compensation for the injuries. The sources of these concepts are not only deeply woven in the fabric of the nation's legal system, but they are an integral part of Montana society and our system of governing ourselves.

The system is an evolving system. Yet, the quick-fix remedy that benefits wrongdoers by limiting the right to full recovery, does not reflect a full appreciation of the special nature of tort law within the legal system. It is not judges that cause or award damages. It is not lawyers that cause or award damages. It is a civil wrongdoer that causes damages. It is citizens, juries, that award damages necessary to provide full compensation for injuries. They make an award only after damage is proven.

There is no evidence that the public interest demands a vast restructuring of tort law. A significant and vast restructuring would occur if arbitrary limits are placed upon damages. It does not make good public policy for the Legislature to enact legislation to ease the concerns of one segment of society, civil wrongdoers (represented by the insurance industry) by limiting the rights of all citizens to seek full redress and recovery through the courts.

Protecting individual rights and serving the public interest in the fair and effective operation of the legal system, is one of the most vital responsibilities of the Montana Legislature. Why should that responsibility be traded for a willingness to take away the rights of individuals in the hope of easing a perceived burden on wrongdoers? No single group in society would receive special treatment under the law. Yet, a special interest seeks to limit the rights of Montana citizens through legislation that will primarily affect the catastrophically injured. It is the responsibility of the Legislature to work to balance all interests while preserving the traditional foundation on which the American justice system is based, the rights of the citizen.

A limitation on damages severely impedes the right to trial by jury. Montana citizens serving on juries exercise the most fundamental right to self-government. Jurors have no purpose, no continuing function, beyond their verdict and serving as citizens. Once they have made a decision, they fade back into the communities throughout Montana, and have no further responsibility toward the events which have involved their time. Yet, because of the conclusions they reach, some who have come before them have fortified their lives and others have been required to pay out money damages as a consequence of the harm they have been found to have done. Jury decisions, at times, have changed the course of history, have caused laws to be discarded or rewritten, have wrought guarantees of our freedoms. In accomplishing all this, the jurors who are Montana citizens, give no reason for their actions and—unlike any other group imaginable—seek nothing for themselves.[5]

Every insurance policy sold in this state sets a limit on damages. The policy limits. There is no need for any other damage limit. Statutory damage limits do not benefit the victim. They do not benefit the public. **Limits do benefit the wrongdoer.** They also take much of the risk out of insurance with no consequent benefit to the injured, to the consumer or to society.

Those who participate in arbitrarily limiting a fellow citizens loss, stand to be victimized by their own folly. The Montana Legislature should not limit the rights of citizens to decide what damage has occurred, nor should it limit the innocent victim's right to recover when the sole beneficiaries are the civil wrongdoer and its insurer. The Legislature should protect our rights—not eviscerate them.

[1]Abba Eban, "Advocate" Vol. 11, No.5, Fall 1985.
[2]Business Week, April 24, 1986.
[3]Rand Corporation Institute for Civil Justice, November 11, 1985.
[4]Vol. 1, No. 1, Tort and Insurance Reform News and Questions Letter, May 1986.
[5]Paraphrase John Gunther "Nothing But the Truth" , ATLA 3 Pamphlet.

REBUTTAL BY JIM TUTWEILER—MONTANA LIABILITY COALITION:

The trial lawyers argue most strenuously that damages should not be capped in the 1987 Legislature. But damage caps are not likely to be a major issue. What the public is demanding in 1987 is a correction of the abuses that liberal judges have created in Montana.

No litigation explosion in Montana? What about wrongful discharge cases? While the suit didn't even exist several years ago, today many terminated employees sue for damages, whether the employer was a business or a government agency. Recently, a Billings jury awarded $2.4 million in a discharge suit. Who wouldn't rather have $2.4 million than a job?

Bad faith litigation is everywhere in Montana today, and brings doubt into commercial transactions where there was certainty just a few years ago. Every contract action seeks punitive damages for violation of a party's "reasonable expectations," and some of the awards, particularly in bank cases, have been nonsensical.

In their rush to put Montana outside the mainstream of the nation's tort law, liberal judges have destroyed the order, reason and predictability that used to characterize Montana law.

1987 is the time to bring back common sense. No one wants a wholesale gutting of our legal system. But the public is demanding that careful and well-reasoned changes be made to restore fairness and reason.

Much more is at stake here than reducing insurance costs, although our insurance climate would surely benefit from a comprehensive reform package. Montanans need to know their rights and responsibilities. Too often, given our constantly changing tort laws, the best guess is wrong. But why should we be forced to guess about the law?

It's time for the Legislature to do its part in the lawmaking process, and to bring relative certainty back to Montana's battered tort system.

LIMITS ON LIABILITY

9. Should the Legislature establish limits on liability?

JIM TUTWEILER—MONTANA LIABILITY COALITION:

It is imperative that the 1987 Montana Legislature act to bring Montana's laws on civil liability in line with those of other states. "Tort reform," the process of addressing abuses in our courts through statutory revision, has already made considerable progress in other states. Unless Montana gets started, insurance companies will continue to leave our state, preferring to do business where their rights and the risks that they insure against are more easily predicted.

The passage of "limits on liability" is not needed as much as is a systematic review of our liability laws to try and fix the abuses we read about every day. A few examples:

—juries award millions of dollars as "punitive damages," leading insurers to conclude that the risk of doing business here is too great. Solution: reform our punitive damage statutes to permit the judge, and not the jurors who are too often swayed by emotional arguments, to decide the amount of the award.

—several defendants are responsible for an injury, but the one with minimal negligence ends up paying the whole bill because he has money (while the other is virtually broke). Solution: repeal the doctrine of "joint and several liability" so that each defendant's responsibility for damages is limited to a percentage consistent with the jury's determination of the percentage of fault.

—an injured party can recover several times over for a single injury, with a defendant paying damages while the government and insurance companies have already paid benefits. Solution: modify the "collateral source rule," which holds that information regarding duplicate payments can't be considered in court.

—a terminated employee feels like he or she got a raw deal, and brings suit for "unlawful discharge," forcing the former employer to spend tens of thousands of dollars paying a lawyer to defend his management decision. Solution: pass a law limiting the situations in which this claim can be brought, and making available an arbitration option so that the case can be resolved without outrageous legal and defense costs.

—juries award huge sums as damages for "pain and suffering," even though no objective means of analyzing or quantifying these types of claims exists. Solution: these type of damages, which are purely subjective, might be limited to some dollar amount determined reasonable by the Legislature. This has been done in other states, including California.

—the present "contingency fee system," under which a trial lawyer takes up to half of a successful claimant's recovery, might be modified. Many people believe that this system is unfair, in that the lawyer gets far more than is justified, and that it results in many frivolous suits being filed just so the lawyer can benefit through settlements for nuisance value. Solution: limit the contingency fee that a lawyer is permitted to collect.

These are a few examples of possible reforms—there are dozens of other ideas. Many states, motivated partly by the hope that insurance costs will fall and insurance availability increase, have passed reforms like these. Although there is only limited experience with these reforms, many informed people believe that these changes will help to hold the price of insurance below the levels it will reach if nothing is done.

But in reality, tort reform is not an insurance issue. Instead, it is a process of fixing excesses in our court system. Insurance companies are just one class of defendants. In August, 1986, the White House Conference On Small Business determined the liability insurance crisis to be the number one problem facing small business in America, and recommended a host of similar reforms.

Finally, it's not only business that suffers. Consumers are paying for outrageous insurance costs when they pay inflated prices for products and services. Taxpayers watch their taxes increase, while they get less for their money. Doctors cut back their practices, many deciding to quit delivering babies because they can't afford insurance.

The answer is clear. Changes are urgently required in our liability system, a system that today benefits mostly the lawyers.

REBUTTAL BY DONALD MOLLOY—Billings:

Using the same wrongheaded reasoning that "Chicken Little" used in the Mother Goose fairy tale, the proponent of the issue of limiting damages screams, "the sky is falling" because of "abuses in our courts" and "excesses in our court system." Everybody knows Chicken Little was wrong. The proponents position is "much cry and little wool."[1]

The advocates of damage limits were to address a specific issue, establishing limits on personal injury damages. Instead, they make a vicious attack on the courts, juries, and lawyers. The reason for this misdirected abuse is self-evident in the concession that "the passage of "limits on liability" is not needed ..." Indeed, the passage of limits on liability are not needed.

Cicero asked rhetorically whether he should attack the man when there is no room for argument. That is the course adopted by the proponents on the limits for liability, because they attack the system, the participants, and the attorneys, and fail to address what they were asked to address. Instead, a pre-packaged "tort reform" scheme is laid out with one sentence solutions to complex social and philosophical problems. It is this same inane reasoning that cost this state thousands of dollars daily when a special session was called in March because of a "liability crises." Fortunately, time elapsed and this Legislature had enough good sense to not act like lemmings going over the legislative cliff of what "other states" have done.

The proponents position paper is nothing but thinly veiled blackmail. What this Legislature is being told is that unless it cows to the insurance companies program, carriers will continue to "leave our state, preferring to do business where their rights and the risks that they insure against are more easily predicted." Insurance companies cried wolf in March. They are crying wolf again. Hopefully, the same good common sense approach of this Legislature will again ferret out the facts and not enact legislation that protects people who do wrong.

It is suggested that many states "motivated partly by the hope that insurance costs will fall and insurance availability increase, have passed reforms like these." Experience shows that this special interest contrivance has no effect on insurance costs or availability. Montana is such a small aspect of the insurance industry that our loss experience is not even a consideration for rates or availability. A philosopher once observed that "anticipation is the greater part of joy." The same can be said about the enactment of damage limits. The anticipation that it will cause insurance costs to fall or make more insurance available will be far greater than the reality.

Damages under the present system serve a significant social function which requires wrongdoers to respond because they did something, or failed to do something and because those acts and omissions resulted in an injury. The broad social issue raised by the question of damage limitation is how society should deal with injuries. The law of personal injury is a body of law that represents the private vindication of individual rights and it should not be tampered with by quick-fix special interest legislation.

[1]Sir John Fortescue, **Governance of England**, ch. 10.

SO_2 AMBIENT AIR STANDARDS

10. Should Montana's SO_2 ambient air standards be reduced to the federal level?

REPRESENTATIVE TOM HANNAH—Billings:

The whole issue of what level sulphur dioxide emissions should be in Montana is really a very simple one. Those opposed to changing the State Standard to the Federal Standard go to great detail to, in my opinion, confuse the issue.

Consider the following clearly understood points and I think that you will agree with me, that the logical move is to raise the standard from .02 PPM, the State Standard, to .03 PPM the Federal Standard.

- There is only one area in violation of the State Standard in the State of Montana—Billings.
- Billings is in compliance with the .03 PPM annual Federal Standard.
- Billings has been operating at the .03 PPM since the passage of the State Standard.
- Adopting the Federal Standard of .03 PPM would simply maintain the status quo.
- Both the Environmental Protection Agency and the Montana Department of Health have said that there are no definable health risks below .04 PPM.
- At these levels, SO_2 is not visible or smellable—what pollution you do smell and see is not SO_2!!
- If you had 1 **Billion** 1" cubes of air, 30 SO_2 cubes under the Federal would be allowed, and the State wants industry to reduce to 20!
- This change would effect SO_2 emissions only, not fluoride, particulate, Nitrogin Oxide, etc.

What we have in the Yellowstone Valley are six **old** plants. (Exxon, Continental, Montana Sulphur, Cenex, Montana Power and the Sugar Beet Factory). If these were new plants, the technology and standards (this change does not effect new source standards) are there to meet the .02 standard. However, the net effect if the state complies is a little bit like trying to **convert** a 1948 Ford emissions to comply with the new Ford Taurus emission standards.

Finally, let's look at the negative impacts if compliance was forced. The cost estimates range as high as 20 million for Exxon, depending on the work required, **and there are no guarantees** that they will in fact get to .02 PPM requirement with the work done!!

- Can the sugar beet factory stand a major financial hit for emissions compliance?
- Western Energy Co. testified that one way they could reduce sulphur emissions was to use lower sulphur content coal. Where do you buy that? Wyoming!!
- If Exxon closed, and you should know that the Billings Exxon is one of the company's smaller, older plants. It refines 1/10 of the New Orleans refinery and is one of the last inland refineries in the Exxon system—the impacts are staggering:
  - —2 million property tax lost —52% of Lockwood School District's money
  - —400 jobs, high paying, living wage jobs
  - —11.5 million payroll lost to Billings
  - —$350,000 School District 2 high school money lost
  - —This is just one of the industries affected.

Let's be wise with the treatment of these valuable industries. We need the jobs, and the general dynamics that these major industries bring to our community and state.

Let's not risk pushing them out because of another senseless, expensive, non-quantifiable government regulation!

Let's keep the status quo. Let's change to the Federal Standard.

REBUTTAL BY HAROLD ROBBINS, CHIEF—MONTANA AIR QUALITY BUREAU:

The presented statement which argues to change Montana's ambient air quality standards to federal standards deserves several responses and comments.

The commentor notes that Billings is the only area which exceeds the state sulfur dioxide standards and thus argues to maintain the status quo (compliance with federal values). We find this an unacceptable proposal. The air quality in Billings is ranked second worst when compared to the 74 major metropolitan areas in the country. Only Pittsburgh has sulfur dioxide values greater than Billings. This means areas of the country such as New York, Cleveland, Los Angeles, Denver, etc., have sulfur dioxide readings lower than Billings. This is a poor image to portray for the "Big Sky." The commentor asserts that the Environmental Protection Agency and the Montana Department of Health and Environmental Sciences admit that there are no definable health risks below .04 ppm. This is a serious misrepresentation of the health effects data. Several studies found that there was an increase in death rates in cities with air pollution values at or near .04 ppm. These increased death rates were in comparison to a cleaner city (.03 in one case). This is **not** to say that no health effects occur at .03, .02, or .01. Due to the seriousness of the health effects and lack of scientific certainty of the data, the Board of Health and Environmental Sciences adopted a standard of .02 to be sure such adverse health effects are indeed not found in Montana.

Statements to the effect that it is impossible or at least dificult to have an older plant meet the .02 standard demonstrate a lack of understanding of air pollution rules and control technologies. It is more than possible for the Billings area industries to reduce their emissions substantially. In fact, the technology has existed for many years. The Asarco lead smelter located in East Helena reduced their sulfur dioxide emissions (sinter plant) by more than 80%, even though the smelter was constructed in 1890. The Billings industries were constructed more than 50 years later. Although the installation of air pollution control is more difficult in an older facility, the principles for sulfur dioxide removal are well established and commonly available.

The commentor has noted that it is important to consider potential impacts of the implementation of the .02 standard. We wholeheartedly agree!. If the department did not agree with that suggestion, enforcement action would have been taken many years ago. The process of attaining standards in areas such as Billings requires careful balancing of the economics involved without losing site of the goal. We submit that the Board of Health and Environmental Sciences, the same agency which is charged with this balancing in the clean air act, should continue this function in Billings. The board can spend the time to objectively analyze the problems and provide an efficient solution.

SO_2 AMBIENT AIR STANDARDS

10. Should Montana's SO_2 ambient air standards be reduced to the federal level?

HAROLD ROBBINS, CHIEF– MONTANA AIR QUALITY BUREAU:

Montana's air quality standards, those standards which apply to the outdoor atmosphere, should not be changed to federal standards simply because federal standards exist. Montana has the right and the responsibility to adopt standards which establish safe levels of air pollution and protect public health and welfare.

Since the answer to the question posed involves a number of complex issues, perhaps it is best to review the air pollution levels in Montana, discuss the standards themselves and what they represent. In much of Montana, air pollution levels are very low. This, however, has not always been the case. Numerous industries have made major efforts to reduce their air pollution emissions by significant amounts over the past twenty years (the approximate time the Montana Clean Air Act has been in effect). Among the more notable efforts include the reductions of fluoride at the aluminum smelter in Columbia Falls, of particulates by many wood products facilities, of carbon monoxide by improved traffic flow systems in many cities, and of sulfur dioxide by the Asarco lead smelter in East Helena. Interestingly, Asarco made their reduction of sulfur dioxide at a cost which exceeded $40 million at a time when the smelting industry was experiencing intense foreign competition. Despite the publicity surrounding the four coal-fired power plants in Colstrip, the area remains far below all ambient air quality standards. There remains only one area which consistently exceeds the Montana sulfur dioxide levels: Billings.

In Montana, the ambient air quality standards are adopted by the Board of Health and Environmental Sciences, a body appointed by the Governor. The standards were initially adopted by the board in 1969, but were re-evaluated from 1978 through 1980. The board adopted a revised set of standards in 1980. In some cases the standards were changed and in other cases, the standards remain the same. For sulfur dioxide, the standards applicable to the Billings area remained the same as in 1969.

The Montana Clean Air Act requires establishment of standards sufficient to protect human health and, to the greatest extent practicable, human welfare (soils, vegetation, visibility, etc.) The standards, however, cannot be derived solely by reference to available scientific information. The process of setting standards demands that some judgements be made and applied to the available information. In adopting the ambient standards in 1980, the board used the following techniques to arrive at the Montana standards:

1. Compilation and Assessment of Scientific Factual Information. A review was conducted by the department and many other interested parties of the available health effects literature for the air pollutants of concern in Montana.
2. Determination of Apparent Health Response. Scientific information was analyzed to establish a level which apparently was sufficient to produce a detectable health response. In order to protect the entire population, the apparent health response included whichever segment of the public was most vulnerable (usually the elderly, young, and those with various lung disorders such as asthma or emphysema).
3. Margin of Safety. Once the apparent health response was determined, a risk assessment had to be made about the unknown effects of the pollutants and the studies which were used to determine the health response. For example, one must consider the accuracy of the air monitoring devices, whether or not the studies were conducted on healthy or sensitive individuals, whether clinical or animal studies support the epidemiological evidence, the possible synergism between air pollutants, undetected effects (failure to detect effects is not proof that such effects do not exist), etc. In accordance with that assessment, a margin of safety ranging from 1 (no margin of safety) to 2 was established for each sulfur dioxide standard.

It should be clear that in order to adopt an ambient air quality standard one must be willing to review and carefully consider a great deal of information. The board did this over a period of nearly two years. Four public hearings and over 2,000 pages of testimony were taken prior to a final decision. Each of the Billings/Laurel industries was an active participant in this process.

It is difficult to contemplate that this amount of time and energy could be spent by the Legislature to properly consider all aspects of the ambient air quality standards. It is appropriate for the Legislature to set policy for the state in terms of laws (Clean Air Act), and to delegate the responsibility of adopting technical standards to an impartial body established especially for such pruposes. The choice of the safest standards should continue to rest with the board. This body has spent the necessary time to address the pros and cons of all issues. In addition, the members of the board are appointed by the Governor while the Legislature sets forth the minimum qualificatios of each board member.

Montana has always had the resolve to make decisions independent of the federal government. The citizens and duly appointed members of the board are more than competent to make such decisions and thus we have no reason to fall back on federal standards when it has been determined locally that health is better protected by the Montana sulfur dioxide standards.

REBUTTAL BY REPRESENTATIVE TOM HANNAH–Billings:

The opponents to changing the Montana air quality standards to the Federal level make several interesting statements that need to be clarified.

- They talk about the "notable effects" of the aluminum plants fluoride reductions and neglect to mention that the Legislature in 1981 also eased the fluoride standards to help them in their efforts.
- They talk about the Colstrip area and how it "remains far below all ambient" standards but neglect to mention that those plants were built under new plant standards and technology.

Perhaps the most interesting claim made by the opponents is "the standards, however, cannot be derived solely by reference to available scientific information". That means to me that the standards are set by some scientific information and some political philosophy. When health impacts are considered on a scientific basis only, both the Montana Department of Health and the Environmental Protection Agency agree that the health response level is .04. The federal margin of safety is 25% or .03 which provides an adequate margin.

Finally, policy is indeed set by the Legislature. It is not uncommon for a governmental agency to over-respond to a Legislative directive. The Legislature has in the past and may again, redirect an agency toward a more realistic position. The choices are simple:

1. Reduce sulphur. How?
   —Lower sulphur **Wyoming** coal!
   —Sweeter (Lower Sulphur) **Canadian** crude!
   —Expensive cleaners & filters

2. Reduce standards. Why?
   —.03 is where we are now! Status Quo.
   —NO discernable health risk below .04
   —Preserves Montana jobs.

Montana must balance environment and industry. We cannot afford to pamper one to the total exclusion of the other. A SO_2 level of .03 is a proper balance that will protect health and provide jobs. Let's change to the Federal level of .03

BUSINESS CLIMATE IN MONTANA

11. Accepting the evidence that states that Montana has a poor business climate, what should be done to improve this situation?

KEITH COLBO–DIRECTOR, MONTANA DEPARTMENT OF COMMERCE:

Business climate is a difficult, if not impossible issue to define: it's perception and reality, and it's something different to everyone you talk to. Typical is to discuss a state's impact on the private sector in terms of business climate that are ill or vaguely defined.

Of course we can talk about business climate without agreeing on a common definition, but that practice gives rise to the usual litany of complaints relating to the economy—a process sometimes fun (most often for the complainer), that provides needed relief for understandable frustration, but a process that is not very constructive.

A statement published by the Committee for Economic Development, whose research is supported by private contributions from business and industry, foundations and individuals, comes close to explaining the term.

The conventional definition emphasizes constraints on business such as labor, land, utility costs, tax and regulation. Another definition stresses the presence of resources that support business, including skilled labor, adequate suppliers, accessible markets, good infrastructure, available capital, high quality of life and a supportive attitude.

Business climate can vary by type of firm. The Alexander Grant—now Grant Thornton—index, for example, measures factors that are geared toward the cost of locating a manufacturing plant in a state. The magazine **Inc.** compiles an index that attempts to assess the environment for growing small-business and entrepreneurial firms. The two indexes can yield dramatically different results as Montana can certainly attest—having either enjoyed or endured rankings ranging from 14th to 47th.

These measures are, at worst, meaningless, as witnessed by several newspapers across the country. One says of the Grant Thornton study: "The figures are accurate; the prose is sloppy; the implications are false; and the impression of objectivity is a sham." An Illinois paper says: "By creating the illusion that its ranking foreshadows a state's manufacturing future, Grant Thornton helps manufacturers do to every state in the union what the Chicago White Sox are doing to Illinois: bluff, or blackmail, the state into giving them the goodies they want." In the rankings' favor, however, is the tendency they have to raise the level of debate about the state's economy—and I'm all in favor of that.

In Montana, economic concerns have been a recurring aspect of our history. I suggest, however, that if the most vocal individuals and groups that cite Montana's "poor" business climate as the foundation of all our economic woes had been active, interested and involved throughout the past 10 years and had supported a broad perspective, rather than a narrow one, we might not be in quite the shape that we find ourselves in today.

I strongly believe that no single interest issue, whether it be taxes, regulations, education, or state government, is going to change our economic future—or our business climate—by itself. What we need, instead, is to keep all the players involved and interested, while at the same time educating them to other perspectives and priorities.

Our economy is changing: we need to understand why; we need to know in what direction it is going; and, we need to know where we would like it to go. We, as Montanans, must decide what kind of economic development is best for us and we haven't yet done that. We need some agreement about the long-term, fundamental supports for and thrusts of our economic development efforts.

In practice, businesses seek some desirable combination of both minimum constraints and maximum supports. The mix varies according to the nature and size of the business and whether it is seeking to start up, expand or relocate.

A state's interest in a vital private sector should be both to facilitate change and to provide supports that are important to business.

REBUTTAL BY REPRESENTATIVE JACK RAMIREZ–Billings:

I agree with Mr. Colbo that business climate ratings may have flaws. I also agree that definitions of business climate may vary. But there **is** a business climate. There **is** a reality of what businesses want and need from state government, and there **is** a perception of whether Montana meets those wants and needs. I deal with businesses every day which compare Montana to other states and find it a difficult, expensive, and often unreasonable place in which to do business.

Mr. Colbo suggests that we need to determine what kind of economic development we want. I feel we should spend less time worrying about that and more time thinking about the fundamental needs of every business. Montana is a state with many natural resources, a limited population, and a remote location. These factors, and the free enterprise system, will dictate to a great extent what kind of economic development will occur in Montana. Within those limitations, state government must develop an atmosphere conducive to **any** business. This means a fair tax system, reasonable regulations, and reasonable state induced costs of doing business. This also requires stability and predictability in the conduct of all branches of state government. Beyond that, Montana cannot affect its economy. But the state has yet to provide that kind of "climate" for our business community.

BUSINESS CLIMATE

11. Accepting the evidence that states that Montana has a poor business climate, what should be done to improve this situation?

REPRESENTATIVE JACK RAMIREZ—Billings:

Montana's economy is in trouble. Some of the trouble is due to circumstances beyond our control. But many of our problems have been created by the actions of state government.

Competiton among states for new and expanding businesses is keen. If Montana is to stop the outward migration of its existing businesses and encourage new businesses to locate here, changes must be made.

A recent survey conducted at Montana State University confirms what our common sense should tell us: businesses both in and out of the state are primarily concerned with state regulatory policies, property taxes, labor costs and union strength. Other studies from other states have shown that businesses consider these, and other "state induced costs" of doing business, in their decisions to expand or relocate.

Montana has sent conflicting signals to business. Its actions have often been unpredictable. The legislature gives and then takes away. The administration forms welcoming committees, but then permits administrative agencies to take belligerent, unyielding and unreasonable positions on specific issues. The first step, therefore, in improving our business climate is an executive policy directing state agencies to take helpful, rather than adversarial, stances in administering laws that affect business.

Several years ago, the state adopted a "Build Montana" program to boost the economy. This package of legislation may have been minimally helpful, but it has not addressed the fundamental problems of state induced costs.

State induced costs, reflected in regulatory and tax policy, must be reduced. Labor costs and union strength will not be addressed. These subjects have been shown to be politically impossible to consider in the legislative arena.

The following action should be taken in 1987:

Taxes: Tax reform is at the top of the list. Initiative 27 reflects the dissatisfaction of the public with the present structure.

The essentials of amy tax reform package are (1)placing a constitutional limitation on state spending, (2) reducing real property taxes, and (3) broadening the tax base through a sales tax. The spending limitation is critical to assure the taxpayer that a sales tax will not simply mean **three** large taxes to pay (sales, income and property), rather than two.

Here are suggestions for a tax reform package:

a. Any tax reform program must begin with a re-examination of government spending. Because of revenue shortfalls, the legislature will have to consider an austerity budget in 1987. The level of spending should be set only after a thorough review of state government"s base level of services, as would be done in the review being suggested by Representative Tom Asay of Forsyth.

b. A referendum should then be submitted to the voters for a constitutional amendment, patterned after the present statute, limiting state spending. The limitation should permit increases no greater than the percentage increase in personal income of Montanans, to offset inflation and population growth. The amendment should permit spending above the limit only by a ⅔ vote of each house of the legislature.

c. A referendum should be submitted to the voters for a constitutional property tax reduction and limitation on commercial, residential, and agricultural real property. The amount of the reduction depends, of course, upon the spending level adopted. For example, a reduction of 10 to 15 percent might be possible with a 3 to 4 percent sales tax patterned after Minnesota's sales tax (with some modifications). Minnesota exempts a number of items from its tax, including prescription and non-prescription medications, unprepared food, and clothing. The referendum would be effective only upon the passage of a sales tax referendeum.

d. The revenue needed for property tax relief and the budget deficit should be made up with a sales tax, which could be referred to a vote of the people. The tax would not be imposed unless the property tax reduction referendum is also adopted.

Other tax reform measures should include:

a. Repeal of the unitary tax. Revenue to the state would be reduced by approximately $10 million annually.

b. Reduction of the coal severance tax to 14 or 20% prospectively, to apply to new production and renewals made upon expiration of existing contracts. A 20% tax would reduce general fund revenues by about $6.7 million per year.

c. Reduction of taxes on stripper wells to keep them in production, and reduction of taxes on new oil and gas production to encourage exploration.

d. Clarification of deductions under the Net Proceeds of Mines Tax.

e. Adoption of the Governor's proposal on railroad taxation under the 4R's Act.

f. Authorization of local option taxes, subject to a vote of the people.

State induced costs: The second major aspect of improving Montana's business climate is the reduction of other state induced costs. Here are some of the actions which need to be taken:

a. Bring workers' compensations benefits and attorneys fees into line with those of other states.

b. Enact tort reform legislation.

c. Enact legislation dealing with wrongful termination actions.

d. Create an infrastructure trust with monies deposited in the coal tax constitutional trust fund.

e. Amend the Hardrock Mining Impact Act to clarify administrative interpretations and regulations which have expanded the law beyond its original intent.

f. Amend the state SO2 (sulphur dioxide) standards to coincide with federal standards, in order to retain industries vital to the economy of Billings. This change, and the amendments to the Hardrock Mining Impact Act, would help send a message to business that Montana can be reasonable and adapt to changing economic conditions to retain its industries.

The foregoing proposals would, in my opinion, have a measurable impact on Montana's economy and its anti-business image.

REBUTTAL BY KEITH COLBO, DIRECTOR— MONTANA DEPARTMENT OF COMMERCE:

As I stated in my previous remarks, business climate is difficult to define. In Montana, much of the discussion of this issue is based on attitudes and perceptions that, unfortunately, have been detrimental to the implementation of meaningful policies. In terms of substantive business climate issues that can be addressed, I believe many Montanans agree with Representative Ramirez that the field can be narrowed considerbly to business taxation and business regulation.

While other factors such as proximity to markets, labor costs and unionization play a critical role in the business climate ratings of **Inc.** magazine and Grant Thornton, more people judge taxes and regulations to be the two areas in which state government can have a significant and positive impact. They feel that government not only has the ability to foster new business development through its tax and regulatory policies, but in struggling economies, it has a responsibility to ensure that its policies are not the cause of business failure.

Taxation, in particular, has received a lot of attention in recent months. Two citizen advisory groups, appointed by the governor and staffed by the Department of Commerce, completed their work in November and recommended that changes be made in the unitary and coal severance taxes. Both committees also recommended a review of the property tax system, with a view toward balancing the state's current overall tax structure. The passage of Initiative 105 is another signal that the public perceives tax reform is essential to the future development of Montana.

In considering the role of government in the state's business climate, Montanans have some important decisions to make. If the public believes that tax cuts will, in these times of budget shortages, improve the business climate, then it must determine not only the size, but also the effectiveness of its government. However, keep in mind that out-of-state firms looking for new locations analyze more than just a state's tax and regulatory structure, they look at governmental services such as education and infrastructure, and they look at a state's commitment to those services.

The difficulty in defining business climate becomes apparent when we realize that it is more than just taxes and regulations. I believe changes can be made in the state's tax and regulatory policies which will encourage new development, however, I also believe that it is critical to balance these business climate factors against others of equal importance—namely, quality governmental services that the public has come to expect.

WRONGFUL DISCHARGE

12. Do you believe that any changes should be made in the wrongful discharge laws, and if so, what?

REPRESENTATIVE KELLY ADDY—Billings:

Of all the "commercial torts" that have developed in the past few years, the one that has the most potential and actual impact on all sizes and kinds of businesses is the claim of wrongful termination. The standards of liability are being articulated on a case-by-case basis by the courts now, and this is not a satisfactory way to inform public and private employers of the procedures they must follow to fire employees who do not perform adequately.

The legislature must define the scope of this tort—what is an acceptable employment practice, and what is not—and the limits of liability, across the board so that employers may know what is expected of them before they are sued by a disgruntled former employee. Legislation at the 1985 session died in the house, and a resolution to study the issue during the interim was not funded. Recently, however, the study committee on liability issues has explored the issue and specific proposals have come forth.

The proposal of the Montana Association of Defense Counsel is the most thorough. It provides that there is no claim unless the employee was fired for refusing to violate the law or condone a violation of the law, or the employee didn't believe there was just cause for the terminaton **and** the employee had worked for the employer full-time for five years **and** the employee was being paid less than $100,000.00 per year. It also limits damages to lost wages up to the time of trial, and, in some cases, one year beyond.

As important as the definition of the standards of liability and elements of damages is the fact that it permits arbitration of the case, which I frankly think should be a mandatory pre-condition to trying the case. This is a less formal and faster procedure, and a less expensive one, than full-blown litigation.

With some minor adjustments, this proposal represents a huge improvement over the present vague state of the law, and should be supported by the business community and the bar.

REBUTTAL BY JIM JONES—Billings:

We are in basic agreement on this subject and no rebuttal is necessary.

WRONGFUL DISCHARGE

12. Do you believe that any changes should be made in the wrongful discharge laws, and if so, what?

JIM JONES—Billings:

The 1987 Legislature must revise Montana's Wrongful Termination Laws. By now it should not be news to Montana employers that the fastest way to jeopardize the financial condition of your business is to terminate or demote an employee. In 1985, the Montana Legislature enacted our "termination at will" statute providing that "an employment having no specified term may be terminated at the will of either party on notice to the other . . ." Until 1982, the Montana Supreme Court recognized and enforced that statute. In a series of cases since 1982, the Montana Supreme Court has judicially repealed that statute. Montana employers are now exposed to liability for very large amounts of damages unless they can prove to the satisfaction of a jury that they had just cause to terminate an employee and did so in an eminently fair manner. In direct contradiction of the express language of the statute, the Court has held that an employee may sue his employer on one of more of four separate theories: (1) discharge in violation of public policy; (2) discharge in breach of an implied or express promise of job security; (3) discharge in "bad faith"; and (4) negligent termination. While most states recognize the first and second theories, only a portion of the states recognize the third theory and only Montana recognizes the fourth.

There are two factors concerning this recent about-face in Montana employment law that are particularly alarming. The first is that this dramatic change was made by the Supreme Court without any notice to employers and then applied retroactively to terminations that had occurred before the change in the law. The second is that no meaningful guidelines have been provided to tell employers when and how they may terminate or demote employees. We do not know what notice is required, how many warnings of improper conduct are required, how much severence pay is required, how the notice should be given or many other factors that may later be used as evidence of "bad faith." Every termination or demotion in Montana is now subject to review by a court and jury. Unless an employer is willing to offer an acceptable sum to settle the claim, he must pay between $20,000 and $100,000 in attorneys' fees and costs to defend himself in court.

The obvious reason for this change in the law was the Court's desire to provide protection and an effective remedy to employees who the Court felt were not being fairly treated. Those employees are now being compensated with awards in settlements ranging from $10,000 to $100,000 in most cases, to several hundred thousand dollars in some cases. The three largest awards by juries to date have been $650,000 to $1,500,000 and $2,500,000. Employers are being forced to improve their personnel practices and to be more fair with their employees.

Unfortunately, there have also been substantial adverse affects of this new law. Hundreds of such claims and law suits have been filed and are pending against Montana businesses. Employers are being coerced into paying unjustified settlements because of the high exposure and high cost of defending such claims. While this change has created a true bonanza for Montana's attorneys, Montana's business climate and competitiveness with other states is damaged. Most insurance companies contend that their general liability policies do not provide coverage for these claims and businesses are left uninsured. The magnitude of the problem discourages insurers from doing business in Montana. Employers incur further expenses in legal battles attempting to obtain insurance coverage. There is an obvious adverse effect on productivity since poor employees are not terminated and are carried on the payroll.

The question before the 1987 Legislature is simply this: Can we preserve the beneficial aspects of the present law and eliminate the detrimental aspects? The answer is yes.

Unlike the other economic problems facing Montana, the Montana Legislature has the power to solve this problem. If there were any doubts on this point prior to the election, the passage of Constitutional Initiative 30 should have resolved them.

A Legislative Interim Study Committee is presently reviewing a proposal presented by the Montana Association of Defense Counsel for legislation entitled "The Wrongful Termination From Employment Act." The proposed bill would establish certain standards and impose limitations upon the current tort actions. The bill would do the following: (1) provide a right of action to "whistleblowers" and anyone discharged for refusal to violate public policy—defined as a policy established by rule or statute, as well as to anyone who was discharged after working for the same employer for more than five years and who earned less than $100,000 per year; (2) limit the available remedy to backpay with interest and no more than one year's worth of "frontpay" or under certain conditions; (3) establish a one year statute of limitations; (4) preempt all other claims based upon termination or employment related matters; (5) provide for an arbitration alternative at the election of the parties, with the added provision that attorneys' fees would be available to a successful litigant if the other party refused the offer of arbitration.

In a recent article, U of M law professor, Scott Burnham, described Montana's tort of bad faith as a "crude method" of assuring that injured parties will be compensated. In the area of employment termination it is a tort that can and must be refined. Montana's economic problems and its reputation for being "anti-business" are bad enough because of things we cannot control. In this case, it is within the Legislature's power to solve the problem.

REBUTTAL BY REPRESENTATIVE KELLY ADDY—Billings:

We are in basic agreement on this subject and no rebuttal is necessary.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE 3-10-87
BILL NO. H.B. 241

MONTANA'S UNIVERSITY SYSTEM

13. What methods of cost savings do you believe are available in the state's university system, and how should these savings be used?

REPRESENTATIVE FRANCIS BARDANOUVE —Harlem:

A serious review of all scholarships and fee waivers should be undertaken. Many thousands of dollars are lost annually through these waivers. Also free "rides" inflate the enrollment base which costs many more general fund dollars. Some ethnic scholarships appear to be clearly unconstitutional. Indian scholarships relieve the United States government of educational obligations and benefit the students very little.

A review of the millions of dollars spent on high cost educational programs in the WICHE, WAMI and Minnesota rival dentistry areas. The total cost of these programs equal approximately the cost of operating Western Montana College. Either reduce the scholarships or require some sort of payback.

A review of projected enrollment calculations and a better method of appropriating on the projections. In 1985 appropriations were made for 898 students over the eventual enrollment. In 1986 - 609 students were overappropriated for who did not enroll. In 1986 the overprojection of enrollment cost the state $2,156,686.

Although controversial, serious consideration should be given to the possible adoption of admission standards. All units spend considerable financial resources on what are high school courses to prepare students to even do college work. A large number of these drop out by the sophomore year. The sophomore class at MSU in 1986 was 39% smaller (about 618 students) than the previous year's freshman class. At the University of Montana, the drop was 35% (360 students). The average student cost for the prior year of 1985 was $4,342 at MSU and $4,580 at U. of M. There may have been substantial cost savings if some of these dropouts had been screened out in the freshman year.

A possible substantial savings would be the closure of at least one unit however, this is not politically possible as I still bare scars from an attempt to do this in the mid-1970's.

The consolidiation of Montana Agricultural Experiment Station and the Cooperative Extension Service at MSU. This received some consideration during the June Special Session, but not enough informational review had been done at that time.

Programs within units should be reviewed for possible consolidation of administrative heads. Business school at Bozeman has three department heads; education at U.M has four department heads.

Elimination of duplicated programs and consolidation into lesser units. Education degrees are awarded at five units. Business degrees are awarded at all six units.

Review of programs that have very few students that are offered on more than one campus. Five degrees in ethnic studies (low enrollment); twenty degree programs in philosophy and religion.

Concentration of higher cost programs on fewer campuses.

Give serious consideration to consolidation of administrative functions into larger administrative units and reduce number of department heads

Making branch campuses out of the smaller units with U.M and MSU as the keep campuses.

Possible partnership of business and university programs in areas of mutual benefit. Coordination of education with business employment programs.

There are many ways cost savings could be used.

Savings could be plowed back into increased faculty salaries, library acquisitions, campus maintenance and equipment purchase.

In a budget crunch the savings could reduce general fund appropriations.

The possibilities of savings are not necessarily supported by me in all areas. At least they should be considered.

REBUTTAL BY REPRESENTATIVE GENE DONALDSON —Helena:

The issue of scholarships and fee waivers is reviewed each biennium. The reallocation of such monies may be necessary but some assistance to students may always be necessary unless we wish access to higher education to be limited to only the wealthy.

The WICHE-WAMI compacts again are the most cost effective method of delivery service to our brightest and best. Payback and service commitments have long been discussed. With many of these students owing 20,000 to 60,000 dollars upon completion of their schooling, we must be careful that greater liabilities to them does not result in the inability for them to participate. If we can afford to spend $15,000 a year to keep a 22 year old in our prison, it would seem that we can afford $10,000 a year to allow our Montana students access to these very positive programs.

Enrollment projections are currently higher than actual enrollment. In the early 80's, the reverse was true when we under-estimated the number of students attending higher education. Trying to project two years in advance is impossible, but a necessity with biennual sessions.

Admission standards may have some merit in the two universities but one would not expect that they will eliminate the loss of students from their freshman to sophomore year. Admissions standards cannot account for a variety of factors that influence whether or not a student continues. For instance, financial resources become more of a factor each year as tuition and other costs continue to rise. Currently 55 percent of Montana students have some type of financial help, either in fee waivers, scholarships, or loans.

The consolidation of programs and elimination of duplication is an on-going concern. The budget crunch has caused greater emphasis on this approach and may result in some cost savings. However, this must be balanced by the issue of access. An example is the strong interest in the MBA program in Billings. Clearly,this is a duplication of programs in other units of higher education, but it may also be a necessary component if we are to provide adequate access to our states citizens.

In summary, all issues regarding suggested cost savings have been discussed by the legislature. The bottom line is we must constantly strive for greater efficiency in our higher education. Money wisely invested in our university system will come back to our state many times.

MONTANA'S UNIVERSITY SYSTEM

13. What methods of cost savings do you believe are available in the state's university system, and how should these savings be used?

REPRESENTATIVE GENE DONALDSON–Helena:

What methods of cost savings are available in the states university system is a question that must be answered in concert with the question; what do we require from our university system? Clearly, cost savings can be found in any budget but the idea that continuous savings can be made without affecting the quality of the product is not possible.

By virtually any measure, Montana has not been extravagant with university funding. We spend less than the average of other states per student, per faculty member, and in our research commitment. Nevertheless, we can point with pride to many of the accomplishments of our university students and units.

Also, when we consider economic and social growth of a state or nation, there are numerous examples of the fact that education in general and higher education in particular is fundamental to sustain economic and social growth.

Many states have made higher education and research as the cornerstone of their long range growth plan. While other growth factors are involved in each state, one cannot find a state that is experiencing solid economic growth that is not also providing a strong basic commitment to higher education. Likewise, as we observe the have and have not nations of the world, the one fundamental element between the two is their interest and success in the education of the majority of their populous. Certainly, Japan is a shining example of a nation rising out of the ashes of World War II, having only limited natural resources yet capitalizing on the people quantity and quality to build a nation that is competing very well on the international scene.

Because of these facts, I am reluctant to suggest cost savings that would further deteriorate our universities' ability to educate our citizens and contribute to the state future well being.

However, there are a few areas that need to be explored as potential long range cost savings. Short term solutions are limited and generally deal with the reduction of the numbers of students in our university system. Clearly, we are not educating too many people in higher education but we may be forcing some of them into higher cost programs because of the lack of a viable alternative. Our current post secondary Vo-Tech system is unable to meet the needs of the state partly because of short sightedness on the part of the legislature. Any of our 25,000 college and university students might be more comfortable with a post secondary Vo-Tech setting if credit transfer, innovative course offering, and stronger Vo-Tech images were developed. This could result in substantial savings for the student and the state.

Vo-Techs could also provide the retraining of the many Montana citizens who will find retraining a necessity several times during their life. The many farm and rural people who will by necessity leave the land is a good example of the type of people that need to be served. In all this we must remember that it is people that create jobs.

The opportunity for Montanans to avail themselves to higher education will become a more difficult problem and must be included in any reorganization of higher education. Two areas that will offer solutions and contain cost savings will be the utilization of existing electronic technology and perhaps the expanded use of compacts such as WICHI and WAMI, which offer educational opportunity without the cost of establishing schools within the state.

We have the ability to transmit throughout the state many course offerings by electronics. Thus you can serve more people without travel and expense associated with a normal campus setting. The WICHI and WAMI compacts have proven time and time again to be great cost savers to the state when we educate those talented people in high cost programs. Further expansion of such programs may need to be explored.

The possibility exists that such units as Montana Tech might be expanded to attract more out of state students. Montana does have large mineral resources and since there are only four other such schools in the United States that provide mineral and mining curriculum, we might be in an advantageous position. Clearly, this could be a benefit, not only to the university system, but the state as well. Higher visibility would eventually attract the mineral extraction industries and student tuition and expenditure would help the viability of the institution. This obviously would require a long range commitment.

Greater incentive to university personnel to seek grants from federal and private sources have been highly successful in other states. This has enhanced educational opportunity and also assisted in economic growth through research. To be successful in this endeavor, we must reward the efforts of university personnel that seek out the research grants available.

The university system needs to become more of a community resource. A commitment to small business is an example where the university could offer assistance in marketing, product development and regulation simplification. This spreads the cost and builds incentives to small business growth.

The issues of cost of our university system is not one that can be done by a flick of a switch. It requires thought and vision if we are to get Montana and Montanans competitive with the rest of the world. I am thoroughly disgusted with the suggestions that the only way to solve our economic woes is to literally destroy all facets of our society and start again.

While we must demand more efficiency in all state agencies, including the university system, we must also recognize there are basic costs that are necessary if we are to have a quality system. We as a state are spending so much of our resources attempting to cure social ills, that we are restricted in our ability to prevent them. Merely closing units without some thought to the long term educational needs of this state is counter productive and lacks the leadership and vision that this state desperately needs.

REBUTTAL BY REPRESENTATIVE FRANCIS BARDANOUVE –Harlem:

There isn't really any rebuttal that I could make to this type of statement. I have no quarrel with the role that the university system should play. You asked me for possible cost savings and I tried to give you my honest thoughts. The statement that Rep. Donaldson made is what the university system always puts forth as its role in Montana.

If money were in ample supply, the objectives that Rep. Donaldson set forth could be carried out. However, it is **not** - not even if the legislature raises taxes by a significant amount.

SENATE JUDICIARY
EXHIBIT NO. 6
DATE 3-10-87
BILL NO. H.B. 241

BUDGET DEFICIT

14. What is your philosophy regarding reducing the state's budget deficit?

REPRESENTATIVE BOB MARKS—Clancy:

At the present time indications are that revenue projections based on current rates together with current expenditures both moved forward through the 1989 biennium (1987-1989) would result in a situation where expenditures would exceed revenues by $125 to $150 million.

The budget can be balanced in any of several ways: Increase revenues, decrease expenditures, utilize available surplus accounts, utilize trust funds for certain expenditures or a combination of some or all of them.

The basic question which rests in my mind is, "How much government and public spending are Montanans willing and able to afford?" There are strong indications that at least the 100,000 residents who signed petitions supporting CI-27 and CI-105 believe property taxes are too high. The fate of these issues on the ballot remains unknown at this time but for the purposes of this paper, I will assume that the next legislature will take action to reduce the property tax load, which I personally would strongly favor.

The impacts of the recent tax reform bill passed by Congress may effectively raise the taxable incomes of Montanans when they file their Montana income tax returns for the taxable years affected by congressional action. Estimates of from $8 million to $50 million in additional taxes may accrue to Montana if no changes are made in the Montana tax rates.

I believe the Governor's Executive budget should include a general fund spending reduction of at least 10 percent or at least $80 million, accomplished by the elimination of programs on a priority basis, and a restructuring of state agencies to create more efficiency. Enabling legislation will be necessary to accomplish this reduction. The essential services most Montanans **need** would still be in place.

Only after considerable budget reductions are made should additional revenues be provided.

Because the impacts of the new federal tax law will be available, consideration of revisions in corporate and individual income taxes should be on the agenda. The maximum state income tax rate of 11% (one of the highest in the nation) should be lowered. If excessive taxes are levied on profit there may be created a shortage of "entrepreneurial capital." Therefore, a very careful balance needs to be achieved.

The high income "loopholes" which the Department of Revenue spokesmen tout need to be examined thoroughly and if good reason indicates abuse or non-payment of taxes in the very high income levels (rather than just flukes or unique situations), then corrections would be made. I don't believe a great deal of revenue is lost in this high income area because the number of taxpayers in the income range of $70,000 and over are few.

Property taxation should be reduced on the state level. Presently about 20% of the property tax paid is to the state through the 45 mill school equalization levy and the 6 mill university levy. If funds from other sources were used these levies could be reduced.

A portion of the coal trust fund ($300,000,000) should be used to fund infrastructure obligations (heavy building maintenance, public works and other capital obligations which are now funded by traditional revenues). This new "trust investment" would provide a better use of that money than just drawing interest from conventional investments. The trust fund should remain "off limits" for ongoing expenditures.

If the budget does not balance after consideration of the previous measures a general retail sales tax should be brought forth; the proceeds of which would allow for property tax reductions and the balancing of the general fund budget. Under no circumstances should the sales tax or any other tax be used to provide further growth in government.

Please note that if CI-27 is adopted by the voters November 4, and its constitutionality is upheld, a wholly different approach will have to be taken.

While I do not support CI-27, I do not believe the task that would be presented by its passage is insurmountable. But a legislative session longer than 90 days may be necessary to restructure funding for local government and education. The long range solution to funding government in an adequate manner is through an expanded economy and the creation of more and better jobs in the private sector. This effort must be kept in mind when laws are enacted and regulations are adopted which affect Montana's business climate. Moreover, the administration of our laws and regulations must be positive toward business, not negative.

A positive attitude on the part of the government is essential to growth and jobs.

REBUTTAL BY REPRESENTATIVE GARY SPAETH—Silesia:

I will assume that I'm responding to the GOP plan since the proposal was mailed by Steve Yenkel. My proposal was my own plan. The GOP plan is basically three fold: 1. Cut Government by 80 million dollars; 2. Decimate the coal trust fund for large scale construction or pork barrel projects; and 3. A 5% sales tax.

The GOP indicates all we need are more jobs, which no one can disagree with, but the GOP plan was sadly lacking as to substance. Where are the jobs, are they in the coal trust busting.pork barrel?

1. To cut eighty million dollars without being specific is unfair to the people of Montana. Education, which composes 58% of the state budget, would be cut by over 46 million dollars. Prioritization is important, but with cuts of this magnitude, we need specifics. For an example, Representative Marks has fought tenaciously for the Boulder River School, but is he willing to take cuts. I think not.
2. The Coal Trust was established for our grandchildren's future and now ten years later the GOP wants to raid it. Our grandchildren have yet to be born. During these tough times, the state should not be embarking on massive pork barrel. Also, what about lost interest.
3. Finally to propose a sales tax when the people of Montana are asking that government be trimmed is irresponsible. The GOP has failed to specify what should be exempted from the sales tax.

In conclusion the GOP plan is long on rhetoric and short on specifics. Tough decisions need to be made and its obvious that the GOP does not have the heart to make them.

BUDGET DEFICIT

14. What is your philosophy regarding reducing the state's budget deficit?

REPRESENTATIVE GARY SPAETH–Silesia:

The question of solutions for deficit reduction assumes there will be a deficit. That may not necessrily be the case.

First, the June special session generally avoided the easy-out approach of transfers and did a great deal towards reducing the base. Of most importance was the 5 percent across the board cuts, the 8 million dollars out of the salary base as a result of the wage freeze bill; reductions in the General Assistance benefits, and the reduction from 4 percent to 1 percent in the school foundation. These items alone reduced the base by close to 30 million. The P.S.C. also was transferred from the general fund to fee supported having a positive effect on the base.

Second, the legislature deleted such new programs as the Drug Enforcement program, the M.B.A. program at Eastern and the detention center at Mountain View and as a result these programs are no longer a part of the base.

The legislature also eliminated its legal requirement to fund the Local Governmental Block Grant program. While it nevertheless has a moral commitment, it now has the discretion to determine the extent of its support. For an example it may consider a return to an Ad Valorem tax similar to that proposed in the special session.

REVENUE PROJECTIONS

The passage of the Federal Tax Reform package will definitely have an impact on state revenues. The House passed version would have had a positive impact of over 42 million dollars during the biennium. The final version will be more.

While the Agricultural sector of our economy is still in the throes of a depression, there is some positive news in that much of the state received some much needed moisture and this should at least firm up income from this sector. (The flooding excepted.)

There is every indication that oil will at least remain steady and possibly experience an upturn. Some national experts are predicting that oil will be $20 a barrel within the next six months but it still has to be remembered that many of these experts predicted that oil would not go below $20 in the first place.

These factors, combined with the reductions in the base, in the special session could very easily result in no deficit even though the resulting budget would be very tight.

LEGISLATIVE SPENDING OPTIONS

The legislature will still be called upon to reduce government and should do eveything possible to make cuts before even considering new revenue. The farmers, ranchers and businessmen have had to tighten their belt, government needs to do the same thing. In this light there can be no consideration of any new programs such as a pay plan and increases in the school foundation without the proposer being willing to gain public support for such needed additional revenue. This will be extremely difficult in light of the atmosphere created by CI-27.

Next, we should go back in and re-prioritize all existing programs. All too readily, we establish a new program because it was of a high priority at the time but as time passes that priority changes. The reality is that once a program is established it has a life of its own.

It may be necessary to consider such taxes as a bed tax to help fund travel promotion and a gas tax to undo the damage which the special session did to highways. Otherwise any changes should be revenue neutral while at the same time encouraging a positive business climate. Tax reform is necessary but is not a part of this paper.

In conclusion, it would be nice to be able to discuss a significant overhaul of our state structure but such is not in the political cards. Montana can easily be categorized as a state with "too much". We have over 500 school district, 5 Vo. Techs 4 within 130 miles of each other), 6 colleges and universities, 3 community colleges (2 within 90 miles of each other), 7 agricultural experiment stations and about twice as many legislators as are needed. The list could go on and on, but the political reality is that we have convinced ourselves that all this is needed and as long as we are willing to acknowledge what it costs and are willing to pay, then we shouldn't complain too much. Otherwise, you should be willing to give up some of your own special projects before you ask others to sacrifice.

REBUTTAL BY REPRESENTATIVE BOB MARKS–Clancy:

The tenor of the other narration seems to indicate that our "ship is coming in" full of treasures. While I share that hope I have a more realistic feeling that the ship may be late in arriving for the 1987 session if it indeed escapes the fate of the Titanic.

There is no question in my mind that our revenue deficiency will exceed $100,000,000.

The revenue options suggested deserve consideration. I am supportive of sunsetting the local government grant program by returning auto licensing to an ad valorem base with the revenue returned to local government and schools.

The bed tax is a legitimate option and should be properly considered.

The question raised that the June session damaged the highways is partly smoke. Careful scrutiny of revenue/spending projections by the Highway Department will show that a shortfall was obvious prior to June and to a substantially greater degree than that caused by June legislative action.

The narrator's suggestion of prioritizing expenditures is not new to me but more imperitive now than previously.

The general tone of the deficit reduction paper was positive but vague on specifics.

MONTANA'S OIL & GAS INDUSTRY

15. What steps could be taken by the State of Montana to stabilize and enhance the oil and gas industry?

BILL BALLARD—PRESIDENT, MONTANA PETROLEUM ASSOCIATION:

While the downturn in the petroleum industry in 1986 has largely been a result of pricing situations controlled far beyond Montana's borders, the state can take steps to assure investment by the industry and jobs for Montanans when the world-wide situation improves.

Two factors that must be considered are the state's geological environment and its political environment.

The geological environment is promising. While 47% of the state's 93 million acres has been leased for oil and gas, less than three per cent of the state is producing at this time. Major areas such as the Overthrust are virtually unexplored and the state's geological history indicates great potential.

Montana currently ranks 14th in the nation for oil production and 20th for natural gas. We produce over 29 million barrels of crude oil and over 52 Bcf of natural gas each year. More than four thousand people are employed in petroleum extraction and refining in Montana.

We are confident the oil and gas are in the ground. Whether they are left there depends on how competitive Montana is with other oil and gas states.

The state can make changes in its political environment that would be conducive to outside investment. Important steps were taken in 1985: the severance tax was decreased from 6% to 5%, the rate on net proceeds taxes was made uniform among counties and downhole equipment was exempted from property taxation, among others. These were crucial, and the change in net proceeds has led to new wells being drilled, even as the industry has suffered its worst year on record in 1986.

Montana must look at its tax climate. North Dakota and Wyoming have overall tax rates slightly less than Montana's. Both have tax breaks for sripper wells (those that produce less than 10 barrels a day). Both will consider tax incentives in their 1987 legislatures. Montana could initiate several incentives that would make the state competitive.

One is a tax holiday on new production (oil or gas from wells drilled after a specified date—e.g., July, 1987). This would not affect existing revenues, as current production would continue to pay all existing taxes. The state and local economies would benefit from increased employment and purchasing by seismic crews, drilling crews and other related industries, while operators would have a chance to recover their costs. Then, after the holiday ended—e.g., one year after production began—the operator would begin to pay all the taxes.

A second is a royalty holiday on state lands. The state would continue to receive income from rentals and bonuses on its lands. If there were production (which is a 1- or 2-in-10 chance), the producer would not have to pay the royalty for a period of one year. The state would realize the benefit of improved lease sales while giving up little potential income, and that only for a short period.

The third addresses stripper wells. Nearly half of the state's 6200 wells are strippers. As the price of oil has dropped, operating costs for these wells does not go down, making them less and less profitale. As these wells are abandoned, their reserves are lost forever. Total stripper reserves are more than 32 million barrels in Montana. A severance tax holiday from stripper wells would improve their profitability and life span.

Taxes have a greater impact on oil development as production declines. The impact of lower oil prices on oil investment will be significantly more severe in states such as Montana that impose high taxes on petroleum production. ("Effects of State Taxes on Marginal Projects." W. David Rossiter, Conoco, April, 1986.)

Montana's regulatory environment is more difficult and expensive to operate in than that of neighboring states. Under the Montana Environmental Policy Act (MEPA), it is possible for a drilling permit to be delayed for a period of six months to several years while environmental reviews are conducted, at a potential cost to the operator of $50,000 to $250,000 and more for a well on private land. The reviews are required for "major actions of state government significantly affecting the human environment." In this case, the action is the issuance of a drilling permit by the Board of Oil and Gas Conservation; no well can be drilled for oil or gas without a permit from the Board. Some 28,000 wells had been drilled since 1921 without MEPA being applied. Exempting the Board from MEPA would not change the environmental or reclamation regulations the industry must meet; it would remove one more stumbling block of needless delays and expense.

Another regulatory area that Montana must consider is the expense of air quality standards. Adopting the less stringent federal standards would protect human health and save at least one Billings refinery millions of dollars.

The oil boom that Billings enjoyed in 1981 is long since over. The industry will be back, but probably not in that form. The seismic crews, the drilling rigs, the investors can go anywhere and spend their money anywhere they believe there is oil. It is for the people of Montana to decide if they want them here.

REBUTTAL BY SENATOR DOROTHY ECK—Bozeman:

While I agree with some of Mr. Ballard's conclusions, there are some which should be questioned:

1. Some kind of a tax holiday on new production may be warranted if we can forego that income. That hardly seems likely, but I would not rule it out. However, a royalty holiday on state lands would probably be unconstitutional since the state is required to receive maximum income possible on school lands.
2. In regard to perceived, future problems in complying with the Montana Environmental Policy Act, I would hope that concerned parties could work out an understanding, with legislation if thought necessary, to assure that compliance with MEPA does not become a stumbling block.
3. I think it may be possible that the legislature will act to delay the imposition of the state air quality standards in the Billings area. I would prefer that this decision remain with the Board of Health. It is a very complex issue with many possible alternatives. It is my understanding that at the time that the Department of Health decides to recommend emissions standards for the Billings industries it will not only give local interests the opportunity to be heard and examine many alternative ways of arriving at compliance, but that they will recommend that the industries be given adequate time (up to 3 years) to comply. I think a negotiated decision would be most effective.

I would hope that those in the Billings area concerned about economic development and attracting new industries would work with the state in seeking ways to help industry in reducing emissions. The area now barely complies with the current federal standards (which are expected to become more stringent) and it is unlikely that any permit application for a new or expanded industry could be approved. That would mean no new industry.

The related health problems of air polution pose a problem for many residents and workers. For their sake and for the interests of the growing tourist industry, we cannot afford to let Billings continue to be tagged as the second dirtiest city in the nation.

Exxon has already agreed that they will reduce their emissions by 15% and may be able to go to 30%. Others have also agreed to at least a 15% reduction. A cooperative effort by all industries which contribute to the problem may prove workable. These reductions are made by recycling sulphur wastes and by improving fuel efficiency and in the long run can be cost saving. In the short run tax or other incentives may be needed.

MONTANA'S OIL & GAS INDUSTRY

15. What steps could be taken by the State of Montana to stabilize and enhance the oil and gas industry?

SENATOR DOROTHY ECK—Bozeman:

While we all recognize that the world wide oil glut and the resulting low prices are our major problem, there are some actions which the State of Montana, working with the Montana petroleum industry and concerned citizens of the state, should be considering.

Regulations and Permits

The proposed exemption of the oil and gas industry totally from the requirements of the Montana Environmental Protection Act is in my view counter productive. This type of action tends to mobilize public interest groups in a confrontational exchange which is not beneficial to either the protection of the environment or the industry.

I would propose legislation making it clear that the Oil and Gas Commission has the authority and the obligation to issue permits stipulating conditions which would protect the environment and public safety in specific situations. These should be spelled out so that the industry knows what to expect. Limits on the extent of review expected, however, would be appropriate.

Taxation

Personal Property Tax (equipment). This tax is probably Montana's least efficient tax. The high cost of appraisal and the lack of uniformity in compliance make it a target for reform. I have discussed possible changes with the Department of Revenue and hope they will have recommendations for the next legislature. It is assumed that if personal property is exempted from the property tax in Montana some replacement will be needed. Industry recommendations should be considered as they are likely most familiar with alternative methods used in other states. If a solution is not worked out for the 1987 session, it should be a subject for study during the interim.

Severance Tax. While I don't expect a lower rate of tax, I think the legislature will be receptive to reasonable proposals linked to productivity. I'm sure we will consider the changes in the tertiary recovery amendments approved at the last session. Other proposals which give consideration to marginal wells, which encourage new and more efficient technology or which would foster new uses of petroleum products or new industries based on petroleum products should also receive favorable consideration.

Net and Gross Proceeds. The 1985 Legislative Session gave the industry what they said they most wanted by providing uniformity in the mills assessed on new oil and gas. In 1981 and in sessions since then, there has been some consideration of replacing net proceeds with severance tax and redistributing the appropriate level of funding to the counties. There could have been some tax advantage to industry because at least at that time, severance taxes could be deducted from windfall profit taxes while net proceeds could not. A sliding scale considering the total state and local taxes paid and tied to profitability may be worth considering.

Resource Indemnity Trust. This is a constitutionally imposed tax with interest income dedicated broadly to reclamation and environmental purposes. There has been controversy about its appropriate use but uses which are clearly within the criteria would include:

—A programatic study which would clarify what criteria the Board of Oil and Gas Conservation would apply in determining conditions or stipulations on a permit and would limit the scope of PERs to very specific situations.

—Clean up of ground water contamination related to old oil and gas operations where the responsible party is not clearly identifiable.

—The Northeast Montana Land and Mineral Miners Association is also supporting the use of these funds to purchase monitoring equipment which may lead to correcting or eliminating future contamination problems.

—Research or pilot projects to develop improved methods of monitoring and preventing ground water contamination or technology transfers which might be applicable.

—Other research fostering the development of new technologies which would increase productivity or markets in the industry.

Economic Development Incentives

The build Montana Program and the Science and Technology Program are concerned with developments which need research, technology transfers or investment or venture capitol. The oil and gas industry could participate in encouraging appropriate and creative use of these programs.

REBUTTAL BY BILL BALLARD—PRESIDENT, MONTANA PETROLEUM ASSOCIATION:

Proper modification of the Montana Environmental Policy Act would remove the potential of unnecessary delay on every well to be drilled in Montana, while still allowing members of the public with standing to be heard. This sort of legislation is vital to prevent the long delays and additional expense that two Montana wells—one since plugged and abandoned, the other not yet drilled—have been subject to. The possibility of such high costs for any well on private land will become a major impediment to exploration in Montana. Such legislation would not modify the extensive environmental protection and reclamation that operators must now adhere to, and it would not be the intent to weaken those environmental regulations.

The Montana environment is protected by regulations specific to exploration and drilling, by the bonds that operators must post when they receive a permit to drill to make sure reclamation is properly conducted, and by the Montana Resource Indemnity Trust Fund. Nearly 70 percent of the $82.5 million paid into the RITF has come from the petroleum industry, yet very little of that money has ever been used—or needed—to indemnify Montanans for damages caused by petroleum development.

During 1987, as the state deals with a very tight budget, the value of tax incentives will be thoroughly debated. In the petroleum industry, there is no question that taxes are very important. Taxes have a greater impact as value declines. Recent studies have shown a great difference in return on investment between high and low tax states. Further, production taxes (such as the severance tax) capture revenue even when there is no profit.

Montana's composite effective tax rate (severance, conservation and property taxes) per $1 of gross income is $.132, the highest in the nation. This compares to .125 in Wyoming and Louisiana, .115 in North Dakota, .0778 in Texas and .0715 in Colorado.

The rising oil prices of the 1970s and early '80s masked the economic consequences of state taxes to a large degree. As the value of oil rose, the attractiveness of oil investment increased everywhere and many states increased their taxes. In 1981, Montana increased its severance tax from 2.65 percent to 6 percent in two large jumps. It is entirely possible that Montana's high petroleum taxes will dry up investment even further.

The tax incentives proposed by the Montana Petroleum Association would help overcome the downward spiral caused by high prices and low taxes. Although nothing can be done in Montana about the present low world-wide price of crude oil, 1987 will be an excellent time for us to take the necessary steps to be competitive with our neighbors to enjoy petroleum investment when the price recovers.

Billings Area Chamber of Commerce
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Billings
Chamber of Commerce

SENATE JUDICIARY
EXHIBIT NO. 8
DATE March 10, 1987
BILL NO. HB 241

PROPOSED AMENDMENTS TO HB 241

(An act providing a procedure and remedies for wrongful discharge)

An Ad Hoc Committee of personnel experts and attorneys who deal with wrongful termination issues in Montana, both from the perspective of discharged employees and employers, met to review HB 241, which is pending before the Senate Judiciary Committee. A hearing before the Senate committee is scheduled for March 10, 1987, at 10:00 a.m. The following amendments were proposed by the Ad Hoc Committee for consideration by the Senate Judiciary Committee:

Proposed Amendment No.	Page	Lines	Section, Paragraph & Subject	Text of Amendment
1	2	8	3.(1) Constructive Discharge	Add the following after the word "alternative": "Constructive discharge shall also mean the failure to recall or rehire a laid off employee in a fair and non-discriminatory manner, or in violation of the employer's personnel policy."
2	2	25	3.(4) Constructive Discharge	Delete the words "failure to recall or rehire"
3	3	11	3.(6) Good Cause Discharge	Add the following to the definition of "good cause": "'Good cause' means a fair and honest cause or reason regulated by good faith on the part of the employer in his decision to terminate an employee. Managerial discretion must be taken in to consideration by the trier of fact in applying the 'good cause' standard."
4	3	19	3.(8) Public Policy Definition	Add the following at line 19, following the word "rule": ". . . or established custom, practice, or law which recognizes the performance of an act that public policy would encourage or the refusal to perform an act that public policy would condemn."

5	3	22-23	4.(1) Public Policy	Delete the words "retaliation for the employee's refusal to violate public policy or for reporting a" and add on line 24, following the word "policy" the following: ". . for which there is no other statutory remedy." The paragraph would thus read: "(1) it was in violation of public policy for which there is no other statutory remedy."
6	3-4	25; 1-3	4.(2) Part-time Employees, Probationary Employees, And Good Cause	Delete as presently written and insert the following: "(2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment."
7	4	4-5	4.(3) Personnel Policy	Delete the word "express" on line 4 and the word "written" on line 5
8	4	14	5.(1) Damages Limitation, Wages	Add the following sentence to this paragraph, beginning at line 14: "This limitation shall not apply to a discharge in violation of public policy or where the employee is in the protected age class of employees under federal or state anti-discrimination laws and has been employed for ten (10) or more years of service."
9	4	15-19	5.(2) Damages Limitations, General and Punitive	Delete the present paragraph and insert the following: "The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer has engaged in actual fraud or actual malice in the discharge. General damages shall be as otherwise allowed by law."
10	4	21	6. Statute of Limitation	Delete the number "1" and insert the number "2."

11	6	6-8	7.(3) Arbitration	Delete this paragraph in its entirety.
12	8	7-11	9.(4) Penalty for Declining Arbitration	Delete this paragraph in its entirety.
13	9	3	12. Effective Date	On line 3, delete the word "accruing and insert the word "arising," so that the section would read: "This act applies to claims arising after the effective date of this act."

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SENATE JUDICIARY
EXHIBIT NO. 9
DATE March 10, 1987
BILL NO. HB 241

RATIONALE OF PROPOSED AMENDMENTS TO HB 241

The Ad Hoc Committee's proposed amendments have attempted to address both employee and employer concerns. The overall rationale of the amendments was to limit wrongful discharge suits to legitimate cases in which employees have been illegally discharged, but for which there would not be adequate or fair redress under the bill as written. The amendments also attempt to establish more specific definitions and standards that are in conformity with present law and/or personnel practices. The proposed amendments are discussed as follows:

Proposed Amendment No.	Subject	Rationale
1	Constructive Discharge	Since the legislation eliminates any actions arising out of layoffs, etc. (which is not proposed to be changed), nevertheless employers should not be allowed to engage in short-term layoffs, then fail or refuse to recall employees for illegal reasons or in violation of their personnel policy. Example: A mill engages in a layoff of several hundred employees for a short time, then fails or refuses to recall older employees with good work records simply because of their age or pension benefits, etc., and in violation of the employer's personnel policy assuring recall rights to laid off employees, before hiring new employees. The bill as presently written would not allow a remedy for an employee who is subject to this type of unfair and illegal conduct.
2	Constructive Discharge	Deletion of the words "failure to recall or rehire" is consistent with Proposed Amendment No. 1. While the original layoff is not subject to wrongful discharge suit, an employer should not be allowed to ignore the rights of laid off employees with impunity.
3	Good Cause	The proposed amendment would provide the courts with a strict definition of "good cause." The proposed definition has been recognized by both courts and arbitrators for many years. Also, it makes it clear that the trier of fact (jury or arbitrator) should not be allowed to "second guess" the employer's decision to terminate for good cause, if the decision met the standard proposed.

4	Public Policy, definition	The present language is too restrictive and fails to encompass situations where employees may be unfairly discharged. Presently the bill does not allow for situations in which an employee is discharged for insisting upon compliance with established and accepted industry safety practices which are recognized by the employer himself. Further, it does not allow for situations where an employee is discharged for engaging in a civic duty (e.g., jury service, voting, etc.). The proposed expansion of the definition of "public policy" is consistent with case law not only in Montana but throughout the United States recognizing this type of public policy definition.
5	Public Policy, Cause of Action	This proposed amendment is consistent with Proposed Amendment No. 4. Furthermore, it makes it clear that an employee cannot bootstrap an violation of a statute for which there is a specific remedy (e.g., discrimination statutes) into a wrongful discharge suit.
6	Part-time Employees, Probationary Employees, and Good Cause	The proposed amendment reflects both employee and employer concerns of the present bill, which limits wrongful discharge suits to employees with three (3) or more years of service and to employees who work more than 1,000 hours per year. Example: Employees with good records who have faithfully worked part-time for 20 years would have no remedy to an otherwise clearly unlawful discharge. Further, the law would encourage employers to reduce the hours of employees (usually the lower-paid and most vulnerable employees) to 990 hours per year just to be in a position to claim this exemption. The 3-year provision, while obviously designed to prevent suits by employees with short tenure, also has a double-edged effect of creating an implication of "tenure" for employees who have been employed for more than 3 years. Further, if the employee has satisfied the employer's probationary period (which the proposed amendment would allow the employer to decide), then such an employee should have the same protection as other employees. Establishing artificial tenure requirements lends itself to manipulation of employee rights merely for the sake of positioning an employer to avoid an otherwise legitimate wrongful discharge suit.

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The amendment would thus simplify the situation and allow suits for employees who were discharged not for good cause and have otherwise satisfied the employer's probationary period, and would allow suits by part-time employees as well.

7 Personnel Policy

The bill as presently written would allow a suit only when the discharge was in violation of an "express" provision of a "written" personnel policy.

It is felt that this provision would provide a great temptation for employers who have written policies to tear them up and use unwritten, sub rosa policies, simply to avoid discharge suits. This would do a disservice both to employees and employers who have established written policies. Furthermore, an employee should not be discharged in violation of an established unwritten policy of employment. Again, the legislation as written would promote subterfuge and destroy the incentive for employers to clearly define their policies. The legislation should encourage, not discourage, employers to avoid wrongful discharge suits by establishing clear policies and guidelines for employment and discharge.

8 Damages Limitations, Wages

This amendment, while recognizing the 3-year limitation on back-pay for younger employees who have better ability to become re-employed following a wrongful discharge, allows for recognition of employees who are 40 years or more of age and who have been employed for more than 10 years. The example situation is an employee 57 years of age who has worked for the employer for 30 years. An employee who has reached that age, and has limited his employment skills to the specialized needs of his employer, should be allowed to show that it is unlikely that he can become re-employed at age 57 in a similar job, if that is the evidence presented. The amendment would still allow the jury to consider whether that is a legitimate claim, and to offset for other earnings. However, the legislation as written is patently unfair to older and more vulnerable employees who frequently are unable to re-enter the job force on the pay levels previously earned. They should at least have the opportunity to present a legitimate claim for economic losses that extend beyond the 3-year period.

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9 Damages Limitations, General and Punitive Damages

The proposed amendment would allow for punitive damages for those limited cases where the discharge is outrageous and motivated by actual fraud or actual malice. The unjustified and malicious taking of a citizen's livelihood should be as subject to punitive damages as are allowed for other outrageous conduct which takes away life or property. The punitive damages standard is strictly established, however, to cases where the evidence is "clear and convincing." The proposed amendment is intended to weed out spurious punitive damages claims, but to allow them where they are truly justified.

With respect to general, non-economic damages, the amendment would allow them to be recovered as "otherwise allowed by law." Other legislation is pending (e.g., HB 167) which would limit the recovery of these kinds of damages in all types of lawsuits. It is felt that however the law is eventually applied, it should apply to discharge suits in the same manner as allowed in other types of litigation.

10 Statute of Limitations

The proposed amendment would allow for a two-year statute of limitations, consistent with the limitations periods for other property damage claims. The one-year period is too short, and again it was felt that suits involving loss of livelihood should not be given a "second class" status under the law.

11 Arbitration

The bill as presently written allows an employer to avoid the court system by creating a final and binding arbitration policy for wrongfully discharged employees, even though the arbitration was not agreed to by the employee and even though the policy was unwritten. The proposed amendment would delete this provision for the following reasons:

(1) The arbitration "policy" would not have to be in writing. Thus an employer who was sued could suddenly develop an arbitration "policy" that had not previously existed.

(2) The arbitration provision repeals the historically established notion that arbitration should always be a mutual and consensual procedure, not one unilaterally imposed by one party.

(3) It is an unfair (if not unconstitutional) deprivation of access to the courts.

(4) A wrongful discharge case that involves the loss of a job should not be relegated to a "second class" legal status. An employee should be entitled to the protection of the established legal system under established legal rules and procedures.

12	Arbitration, Penalty for Refusing	The proposed amendment would delete this provision, which would penalize a party who refuses to go to arbitration. It is unfair for the reasons set forth in Proposed Amendment No. 11. This provision is also double-edged in that it might promote more unmeritorious claims than it would avoid (demand by a discharged employee to go to arbitration on his claim, which he might not be willing to pursue if he had to undergo judicial scrutiny of it).
13	Effective Date	The proposed amendment is simply a change in semantics to make the meaning of the effective date more clear. It is not clear what is meant by a claim "accruing" and needless litigation may occur to define or decide what is meant by it. The word "arising" will avoid any such confusion.

SUMMARY

The foregoing proposed amendments were suggested and drafted by a group of personnel experts and attorneys who attempted to reflect a balanced concern for both employee and employer rights. The group was composed of the following:

1. Alan Brown, a personnel expert from Missoula who represents and/or testifies on behalf of both employees and employers.

2. Kim L. Ritter, an attorney with Milodragovich, Dale & Dye, Missoula. Her firm defends wrongful discharge suits on behalf of employers, but does have some experience in representing discharged employees as well.

3. Joan Jonkel, an attorney in Missoula, who represents primarily discharged employees, but also counsels employer clients on this subject.

4. Monte Beck, an attorney in Bozeman, who represents primarily discharged employees.

5. Mike Meloy, an attorney in Helena, who represents discharged employees, but also counsels employer clients on this subject.

6. Donald Robinson, an attorney in Butte, who represents primarily employers in discharge suits and counsels management, but also has represented discharged employees.

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March 2, 1987

RECEIVED
MAR 05 1987
MOORE, ROTH & ROBINSON P.C.
OUR FILE NO.

FOR IMMEDIATE ATTENTION

Re: Proposed Fair Employment Act, Senate Bill 5965

Dear Labor Notes Reader:

The enclosed proposed legislation was introduced in the 1987 Washington Legislature on February 23, 1987, by Senator Frank Warnke (Democrat, Auburn), the Chairman of the Senate Commerce and Labor Committee. If enacted into law in this State it would eliminate totally the long-established doctrine of "termination at will." In its place, employers would have to be able to prove justification for each termination decision under a "just cause" standard. The proposed statute also affects economic reductions in force by providing that where an employee is laid off solely for economic reasons, he may challenge the decision by alleging that the employer's decision is "arbitrary and capricious."

The Act would apply to every employer in this state who employs eight or more persons. Section 2(1). All employees would be covered if they had been employed by that same employer for a period of three years. Exceptions are public employees, union employees, or any employee governed by a "private employment agreement." Section 2(2). The Bill would give every single person discharged or laid off in Washington State the right to file a mandatory arbitration proceeding in Superior Court. Sections 5 and 6. The award of the arbitrator would be final and binding unless the arbitrator's award was challenged in the Superior Court which could set aside the decision only on very limited grounds. Section 6(1). Failure to challenge the arbitrator's award within sixty days would result in a binding civil judgment against the employer. Section 6(3).

In the arbitration proceeding, the employer would have the burden of proving "just cause" for the discharge "by a

preponderance of the evidence." Section 7(1). The employee would have the burden of proving damages or relief sought by a similar standard. Section 7(2).

The arbitrator would have enormous powers of affording relief, including money damages for all economic losses related to the discharge, reinstatement, and "future lost wages" for three years. Section 8. The latter remedy is so radical that it is now applied only in age discrimination cases where aggrieved employees will never be able to get another job. This proposed Bill would afford such relief to every employee discharged or laid off if the employer could not prove "just cause" for the termination or where the employee convinced the arbitrator that a layoff due to an economic reduction in force was arbitrary and capricious.

The Bill would also create a new cause of action to protect company "whistle blowers." Section 9. It would give them a right to sue an employer for actual damages, injunctive relief, and allow them to collect attorneys fees if the employee was "retaliated against for asseration of the rights set forth" in Section 9. Further, the Bill provides that no factual determination from the arbitration proceedings would preclude different findings of fact in any other proceeding, including claims for unemployment compensation. Nor would any adverse decision in another proceeding, including an unemployment compensation hearing, be binding on a subsequent discharge arbitration. In short, the employer would be forced to expend time and money defending both actions even if the employee had absolutely no basis to challenge the discharge or layoff. Section 13.

Of a broader concern, there has been no assessment by the Bill's supporters of the enormous impact of this Bill on already overcrowded court dockets in this State. A reduced filing fee of $35.00 (compared with the $70.00 civil filing fee) would further encourage the filing of these petitions. Indeed, under the Bill the forms would be printed by the State and the Clerks of the Superior Courts would be required to maintain sufficient numbers of them to give them out to anybody who walked into the courthouse looking to challenge an employer's decision. Section 11.

In our view, if enacted into law the proposed legislation would not help attract new business to Washington State since there would be no other state in the country which offers such broad guarantees of continued employment to employees. It

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also penalizes employers who have maintained nonunion operations through the years.

The requirement that the employer must defend every economic layoff could come at a time when a company's assets to pay for such a defense were at their lowest.

We urge you to examine the proposed legislation carefully and to make known your views on its merits to your elected Representatives. The Bill is currently assigned to the Senate Committee on Commerce and Labor although no committee hearings have been scheduled as this letter is being written. It's sponsor in the House of Representatives is Rep. Dennis Dellwo (Dem., 3d Dist., Spokane). Legislators can be reached through the Legislature "Hot Line" at 1-800-562-6000. If you have any questions please do not hesitate to call the Schweppe law firm.

Very truly yours,

SCHWEPPE, KRUG & TAUSEND, P.S.

RCT:mp

Enclosure
0720K

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BILL NO. H.B. 241

SENATE BILL NO. 5965

State of Washington 50th Legislature 1987 Regular Session

by Senator Warnke

SENATE JUDICIARY
EXHIBIT NO. 9 A
DATE 3-10-87
BILL NO H.B. 241

Read first time 2/23/87 and referred to Committee on Commerce & Labor.

AN ACT Relating to employment; amending RCW 7.06.020; reenacting and amending RCW 36.18.020; and adding a new chapter to Title 49 RCW.

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

NEW SECTION. Sec. 1. The legislature finds that a significant number of the private sector employees in this state are subject to the common law employment doctrine of "terminable at will," and are consequently without any meaningful job security. The legislature further finds that speedy and economical redress for unjust discharge is best achieved by implementation of a system modeled after the arbitration process common to collective bargaining agreements in the private sector.

NEW SECTION. Sec. 2. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Employer" includes any person, persons, partnership, association, or corporation acting as an employer or in the interest of an employer, and that employs eight or more persons in the state of Washington.

(2) "Employee" includes any person employed on the effective date of this act, or hired thereafter, who has been employed by the same employer, including any predecessor in interest, for a period of three years except:

(a) Workers who work for an employer fewer than one hundred twenty days per year;

(b) Any person whose terms and conditions of employment, including those relating to discharge, are governed by statute, administrative regulation, union contract, or any private employment agreement as defined in this chapter;

(c) Any person who has an ownership interest in the business of the employer other than an employee stock plan, profit sharing plan, or similar employee benefit; and

(d) Any person employed by his or her parent, spouse, or child.

(3) "Private employment agreement" includes any written employment contract, employee handbook or manual, or similar document, that is established by the employer, whether or not subject to negotiation, and that has been provided by the employer to the employee with the expectation that the employee will rely on such agreement as the basis for the terms and conditions of employment, as long as the private employment agreement requires "just cause" for discharge and contains procedures culminating in impartial, final, and binding arbitration, with remedies similar to those provided for in this chapter.

(4) "Just cause" means a sufficient reason, judged by a standard of reasonableness, for the employer's decision. The law developed in the industrial relations area and, to the extent applicable, in the public employment cases in this state should be considered by the arbitrator in applying this standard to the various fact patterns: PROVIDED, That where an employee's position is managerial in nature and either is one primarily characterized as being confidential, or one which principally involves policy-making responsibilities, just cause shall be determined on the basis of whether such discharge is "arbitrary and capricious."

(5) "Discharge" includes (a) dismissal, (b) termination, (c) suspension without pay that is either indefinite in length or in excess of thirty work days, (d) lay-off, or (e) refusal to rehire or recall unless the employee was discharged for just cause or voluntarily quit.

NEW SECTION. Sec. 3. (1) An employer shall not discharge an employee without just cause. Any employee discharged without just cause shall have a remedy under this chapter.

(2) In any discharge based solely on economic reasons, review of the employer's decision, including any managerial determination regarding budgetary matters or allocation of resources, is limited to whether the employer's decision is arbitrary and capricious.

Notwithstanding any other provision of this chapter, the employee shall have the burden of proof regarding whether the employer's decision was arbitrary and capricious.

NEW SECTION. Sec. 4. Any employee who is laid off solely for economic reasons shall have a preferential right of rehire if a comparable position becomes available with the employer within one year and the employee has a current application on file with the employer. If more than one employee is involved, the priority for rehiring shall be by seniority unless another method is prescribed by a private employment agreement in effect at the time of the layoff. Any former employee not rehired in accordance with this section may appeal in the manner provided for appeal of any discharge under this chapter. Such an appeal must be commenced within sixty days of the employer's refusal to rehire.

NEW SECTION. Sec. 5. Any discharged employee may appeal the employer's discharge decision within sixty days after receiving written notice of the same. No appeal period begins to run absent such written notice, but no appeal may be initiated by a discharged employee later than one hundred eighty days after the date of his or her discharge. The appeal shall be initiated by the execution of a "petition for arbitration of discharge" on a form available from the superior court, and the filing of the petition with the superior court in the county where the employee principally performs services for the employer. The county clerk shall provide the employer with two copies of the petition by certified mail, return receipt requested, one directed to the individual who discharged the employee as named in the petition, and the second copy directed to the employer at the address set forth in the petition.

NEW SECTION. Sec. 6. (1) Upon the timely filing and service of a petition for arbitration of discharge the superior court shall assign the petition to an arbitrator. In those counties adopting mandatory arbitration under chapter 7.06 RCW, the arbitrator shall be assigned and thereafter conduct an arbitration in a manner consistent with the superior court mandatory arbitration rules and chapter 7.06 RCW, except as otherwise provided in this chapter. In those counties

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not adopting mandatory arbitration under chapter 7.06 RCW, an arbitrator shall be assigned by the superior court and shall conduct an arbitration in a manner consistent with the superior court mandatory arbitration rules, as if they were otherwise in effect in that county. Any arbitration award under this chapter is final and binding, and subject to challenge only in the manner provided for in chapter 7.04 RCW.

(2) Any motion to vacate an award in accordance with RCW 7.04.160 shall be served and filed no later than sixty days after the arbitrator's award is filed of record with the superior court and served upon the employer and employee.

(3) If no motion to vacate has been served and filed within sixty days after the arbitrator's award is served and filed as set forth in subsection (2) of this section, the clerk of the court shall enter judgment which shall have the same force and effect as judgments in civil actions.

NEW SECTION. Sec. 7. In any arbitration conducted under this chapter:

(1) The employer shall have the burden of proving by a preponderance of the evidence "just cause" for the discharge; and

(2) The employee shall have the burden of proving, by a preponderance of the evidence, the appropriate damages or relief. The burden of proving entitlement to back pay shall include proof that the employee has made a good faith effort to obtain other employment.

NEW SECTION. Sec. 8. (1) The arbitrator may award relief as follows:

(a) Compensation for all economic loss proximately related to the discharge of the employee, including future economic loss; and

(b) Reinstatement to employment, in lieu of future lost wages, if the arbitrator finds reinstatement will not substantially impair the employer's ability to conduct its business.

(2) In any arbitration in which the employee is not awarded reinstatement, the employee may not be awarded future lost wages in excess of three years from the date of discharge.

NEW SECTION. Sec. 9. (1) Every person employed by another shall have the following rights:

(a) To disclose any activity, policy, or practice of his or her employer that is in violation of law, rule, or regulation that the employee in good faith believes presents a substantial risk to the public health, safety, or fiscal integrity;

(b) To provide information to, or testify before, any public body conducting an investigation, hearing, or inquiry into an alleged violation of law, rule, or regulation by his or her employer;

(c) To object to, or refuse to participate in, any such activity which is in violation of a law, rule, or regulation; and

(d) To make a claim for benefits that arise out of the employment relationship.

(2) No person who employs another shall discharge, suspend, demote, refuse to rehire, or otherwise retaliate against an employee who, in good faith, exercises any of the rights in subsection (1) of this section.

(3) Any person who is retaliated against for assertion of the rights set forth in this chapter shall also have a civil action for actual damages, injunctive relief where appropriate, and, if the prevailing party, reasonable attorneys' fees.

NEW SECTION. Sec. 10. Nothing in this chapter prohibits a claim for relief authorized by statute, or any common law claim for libel or slander, outrage, invasion of privacy, or for any intentional tort recognized under the common law committed during the course of, or arising out of, the employment relationship. Nothing in this chapter prohibits any action relating to any issue, other than discharge, based upon a written or oral contract.

NEW SECTION. Sec. 11. The superior courts of the counties of this state shall maintain a sufficient number of forms for a "petition for arbitration of discharge." This petition shall include on the back, the text of sections 2 and 4 of this act, and each court shall have a copy of this chapter available for public inspection. The petition shall be in a form as follows:

SUPERIOR COURT FOR THE COUNTY OF _____

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In re (Name of Employee)) CIVIL ARBITRATION NO. _____

)
)
Employee) PETITION FOR ARBITRATION OF DISCHARGE/REFUSAL TO REHIRE
)

1. I, _____, believe I was discharged/not rehired without just cause, as those terms are defined in the "Fair Employment Act."

2. I was employed by (Name of Employer), employer, located at (Business Address), for ___ years, ___ months.

I performed services for my employer principally within _____ County, Washington. I believe this employer employs 8 or more persons within the State of Washington.

3. I received ___ oral ___ written notice of discharge/refusal to rehire on (Date). The effective date of my discharge was _____.

The person who discharged/refused to rehire me was (Name and Title), whose business address is _____.

4. I hereby request arbitration in accord with the provisions of the Fair Employment Act.

_____
Signature of Employee
or Legal Representative

_____
Address

_____
Telephone Number

_____
Employee's Social Security Number

Upon the filing of a petition by the employee or the employee's legal representative, the superior court shall mail copies of the petition to the employer as specified in this chapter, and provide a copy to the superior court for initiation of arbitration proceedings. The filing fee for a petition shall be thirty-five dollars. No other papers associated with the arbitration shall be filed with the court other than notices of appearance, any notices or rulings related to docketing of the arbitration, and the arbitrator's award.

NEW SECTION. Sec. 12. Every employer shall post a copy or copies of this chapter on the employer's premises in a manner so as to be freely accessible to employees.

NEW SECTION. Sec. 13. No determination of fact or law contained in a decision or award under this chapter may be preclusive in any other action or proceeding. A finding of fact or conclusion of law

contained in a decision of an administrative law judge, appeal board, or court, obtained under Title 50 or 51 RCW shall not be preclusive in an action under this chapter.

NEW SECTION. Sec. 14. This chapter shall be known as the fair employment act.

Sec. 15. Section 2, chapter 103, Laws of 1979 as last amended by section 3, chapter 265, Laws of 1985 and RCW 7.06.020 are each amended to read as follows:

(1) All civil actions, except for appeals from municipal or justice courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of ten thousand dollars, or if approved by the superior court of a county by two-thirds or greater vote of the judges thereof, up to twenty-five thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration.

(2) If approved by majority vote of the superior court judges of a county which has authorized arbitration, all civil actions which are at issue in the superior court in which the sole relief sought is the establishment, termination or modification of maintenance or child support payments are subject to mandatory arbitration. The arbitrability of any such action shall not be affected by the amount or number of payments involved.

(3) All petitions for arbitration of discharge under chapter 49.-- RCW (sections 1 through 14 of this 1987 act) in counties that have mandatory arbitration are subject to mandatory arbitration.

Sec. 16. Section 1, chapter 38, Laws of 1973 as last amended by section 104, chapter 7, Laws of 1985 and by section 1, chapter 24, Laws of 1985 and RCW 36.18.020 are each reenacted and amended to read as follows:

Clerks of superior courts shall collect the following fees for their official services:

(1) The party filing the first or initial paper in any civil action, including an action for restitution, or change of name, shall pay, at the time said paper is filed, a fee of seventy dollars except

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in proceedings filed under RCW 26.50.030 where the petitioner shall pay a filing fee of twenty dollars.

(2) Any party filing the first or initial paper on an appeal from justice court or on any civil appeal, shall pay, when said paper is filed, a fee of seventy dollars.

(3) The party filing a transcript or abstract of judgment or verdict from a United States court held in this state, or from the superior court of another county or from a justice court in the county of issuance, shall pay at the time of filing, a fee of fifteen dollars.

(4) For the filing of a tax warrant by the department of revenue of the state of Washington, a fee of five dollars shall be paid.

(5) The party filing a demand for jury of six in a civil action, shall pay, at the time of filing, a fee of twenty-five dollars; if the demand is for a jury of twelve the fee shall be fifty dollars. If, after the party files a demand for a jury of six and pays the required fee, any other party to the action requests a jury of twelve, an additional twenty-five dollar fee will be required of the party demanding the increased number of jurors.

(6) For filing any paper, not related to or a part of any proceeding, civil or criminal, or any probate matter, required or permitted to be filed in his office for which no other charge is provided by law, or for filing a petition, written agreement, or memorandum as provided in RCW 11.96.170, the clerk shall collect two dollars.

(7) For preparing, transcribing or certifying any instrument on file or of record in his office, with or without seal, for the first page or portion thereof, a fee of two dollars, and for each additional page or portion thereof, a fee of one dollar. For authenticating or exemplifying any instrument, a fee of one dollar for each additional seal affixed.

(8) For executing a certificate, with or without a seal, a fee of two dollars shall be charged.

(9) For each garnishee defendant named in an affidavit for garnishment and for each writ of attachment, a fee of five dollars shall be charged.

(10) For approving a bond, including justification thereon, in other than civil actions and probate proceedings, a fee of two dollars shall be charged.

(11) In probate proceedings, the party instituting such proceedings, shall pay at the time of filing the first paper therein, a fee of seventy dollars: PROVIDED, HOWEVER, A fee of two dollars shall be charged for filing a will only, when no probate of the will is contemplated. Except as provided for in subsection (12) of this section a fee of two dollars shall be charged for filing a petition, written agreement, or memorandum as provided in RCW 11.96.170.

(12) For filing any petition to contest a will admitted to probate or a petition to admit a will which has been rejected, or a petition objecting to a written agreement or memorandum as provided in RCW 11.96.170, there shall be paid a fee of seventy dollars.

(13) For the issuance of each certificate of qualification and each certified copy of letters of administration, letters testamentary or letters of guardianship there shall be a fee of two dollars.

(14) For the preparation of a passport application there shall be a fee of four dollars.

(15) For searching records for which a written report is issued there shall be a fee of eight dollars per hour.

(16) Upon conviction or plea of guilty or upon failure to prosecute his appeal from a lower court as provided by law, a defendant in a criminal case shall be liable for a fee of seventy dollars.

(17) For filing a petition for arbitration of discharge or refusal to rehire, there shall be a fee of thirty-five dollars.

(18) With the exception of demands for jury hereafter made and garnishments hereafter issued, civil actions and probate proceedings filed prior to midnight, July 1, 1972, shall be completed and governed by the fee schedule in effect as of January 1, 1972: PROVIDED, That no fee shall be assessed if an order of dismissal on the clerk's record be filed as provided by rule of the supreme court.

(((18))) (19) No fee shall be collected when a petition for relinquishment of parental rights is filed pursuant to RCW 26.33.080

or for forms and instructional brochures provided under RCW 26.50.030.

NEW SECTION. Sec. 17. Sections 1 through 14 of this act shall constitute a new chapter in Title 49 RCW.

NEW SECTION. Sec. 18. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

Bozeman
Daily Chronicle

Economy

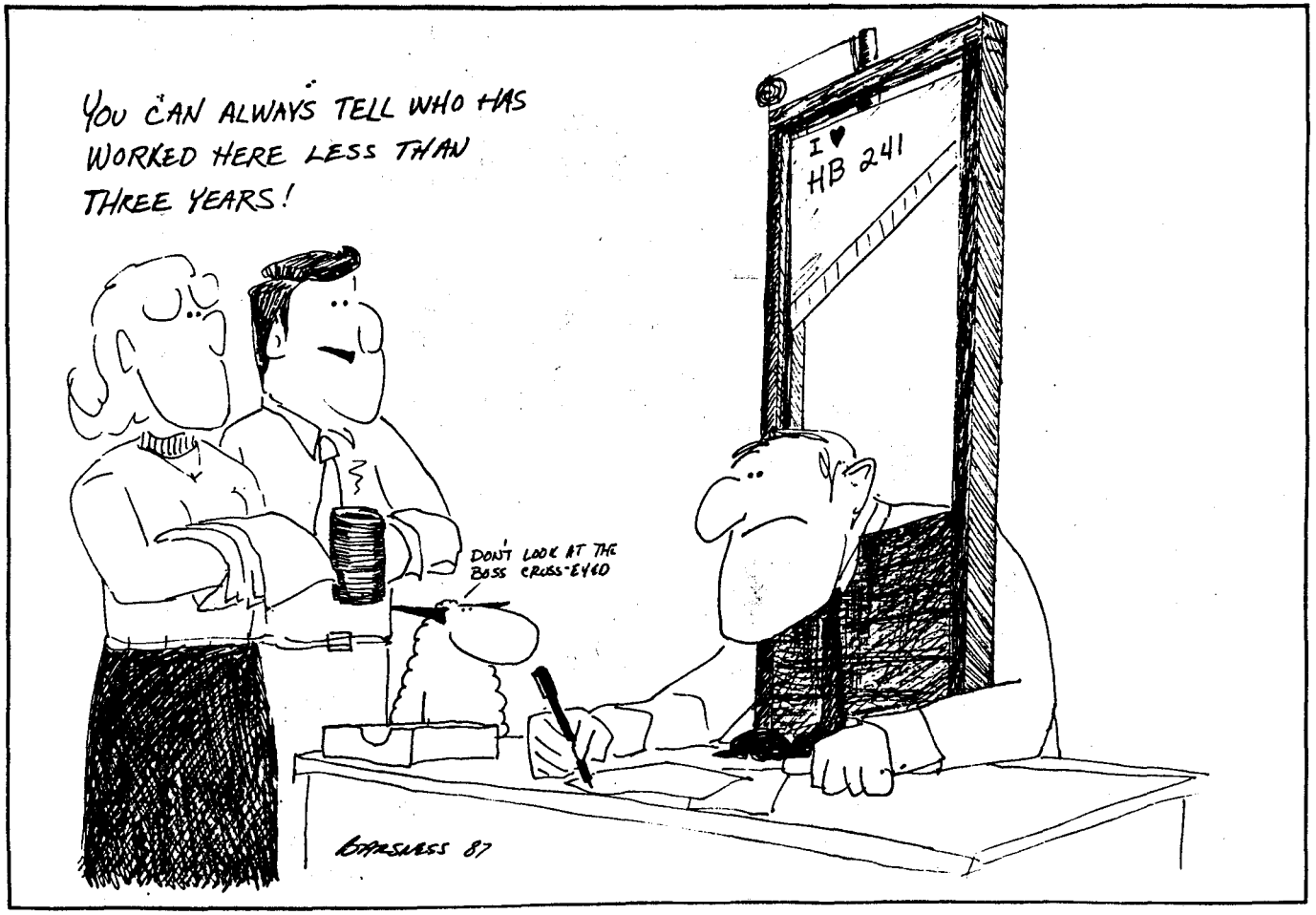

Illustration by John Barsness

Fired: Wrongful discharge bill raises questions about job protections in the workplace

By TERRY SACKS

representative of the Montana Association of Defense Counsel, says as matters stand now, employers that they can't fire anybody without getting sued. And he argues the Legislature is workers would lose protection in the following kinds of circumstances

By TERRY SACKS
Chronicle Staff Writer

Nearly crying, the woman talks as if it were only yesterday that she was accused of stealing $25 from her employer and fired from her job.

"I was the best worker they ever had," says the woman whom we'll call Lisa. "There wasn't anything I couldn't do."

Now 39, Lisa, who asks to remain anonymous, believes she was fired because the store manager resented the fact that she made "so much money for a woman." She says the store's owner wanted to cut back, but didn't know how.

"Instead of cutting my pay, they fired me," she says, adding that her employer made no attempt to investigate the missing cash with other employees.

"I felt like I wasn't worth 2 cents," she says of being fired. For months afterwards, she recalls, "I just could not get my feet back on the ground. All I did was cry all day long."

She filed a wrongful discharge suit against her former employer, which was later settled out of court. Asked why she decided to sue, the woman says, "I had three children. I needed my job and depended on it. I worked hard at it."

She also sued, she says, "because I felt wrongfully treated, and people don't treat people that way. I never treated them that way. I worked hard for them and gave them my soul."

'Instead of cutting my pay, they fired me. I felt like I wasn't worth 2 cents. I just could not get my feet back on the ground. All I did was cry all day long.'

—Fired worker

The Montana House recently voted by an overwhelming margin to greatly restrict the ability of people like Lisa to sue their employers for wrongful firings.

The entire Bozeman House delegation voted for the pro-business bill, which passed 73-27.

Some Bozeman lawyers who work on so-called "wrongful discharge" cases say that if the Senate concurs with the House vote, the law would reel Montana back to the "industrial dark ages" of employee rights.

Supporters of the bill contend it would improve the state's poor business climate by making Montana more attractive to fledgling enterprises, which won't risk starting a business only to get sued for getting rid of the "dead wood."

The number of wrongful discharge suits filed in Montana reflects the problems employers face, say the bill's supporters. According to a fact sheet issued by the Montana Association of Defense Counsel, a total of 182 wrongful discharge suits were filed in Billings state and federal court between 1981 and October 1986. In Great Falls 89 suits were filed and in Helena 84 wrongful discharge suits were filed during the same period.

Barry Hjort, a Mountain Bell lawyer and representative of the Mo[illegible]na Association of Defense Counsel, says [illegible]ers stand now, employers don't know [illegible]the standards are ... whether even you can terminate someone without fearing a lawsuit."

And Bob Correa, lobbyist for the Bozeman Area Chamber of Commerce, calls the legislation a "real fairness bill."

That the likes of Bozeman Democrats Dorothy Bradley, John Vincent and Dick Corne voted for the bill signifies its fairness, Correa says.

Correa says he expects the bill, a top priority of the pro-business Montana Liability Coalition, "to whiz right right through the Senate."

While the bill would allow wrongful discharge suits under certain situations, critics of the bill charge it would effectively eliminate all wrongful discharge suits, regardless of their merits, because lawyers wouldn't have any economic incentive to take the cases.

"I think it's going to be law," says the bill's sponsor, Rep. Gary Spaeth, D-Silesia.

"We may have eliminated wrongful discharge as a cause of action," he acknowledges. "The bill may be a little drastic, but it's a problem that needs drastic action."

House Bill 241 allows wrongful discharge suits only if:

—The employee worked full time, 1,000 hours a year, for at least three years.

—The firing was in retaliation for the worker's refusing to violate a law, reporting a violation of the law, or refusing to violate the employer's personnel handbook.

—The firing wasn't for "good cause," related to job performance.

The bill would apply to the vast majority of workers in Montana, who are employed "at will," not represented by unions or who don't have employment contracts.

The bill would limit damages in lawsuits as well. Three years of wages and fringe benefits — minus what the worker could have earned with "reasonable diligence" in a new job — is the maximum a plaintiff could collect.

"There is no right under any legal theory for wrongful discharge for pain and suffering, emotional distress ... and punitive damages...," according to the bill.

"I'm appalled," says Bozeman lawyer Jim Goetz of the House's passing the bill.

"So many people work under a supervisor where their basic livelihoods depend on being treated fairly," Goetz says. "There would be virtually no job protection — that's what it amounts to."

"It's a horrible thing," adds Bozeman lawyer Mike Cok of the bill.

They and other Bozeman lawyers say they are especially disturbed that the bill would repeal existing "common law" that employers have to deal with employees in good faith and use "reasonable care" when firing them.

Even though the bill says a worker couldn't be fired without "good cause" or job-related reasons, lawyers say the bill would allow employers to make up false reasons for getting rid of employees.

"This is back to the days of slavery," says Cok. "You're an employer's property — bought and sold and used up."

Monte Beck, another Bozeman lawyer, says the bill is a "backlash" against the perception by employers that they can't fire anybody without getting sued. And he argues the Legislature is taking unreasonable pains to please business interests.

"This is a sad day in the state of Montana and it's a step back into the dark ages of employment law," he said.

"You can bet there are a lot of smiling faces in the corporate board rooms of Montana."

Moreover, he says, "I can state to you unequivocally that wrongful discharge is in effect dead in Montana, because no lawyer will take a case."

The reason, lawyers say, is the bill's limitation on damages would mean lawyers couldn't cover their costs plus make a reasonable profit.

If the bill passes, Beck says a lawyer won't risk taking a case without being absolutely sure the jury will decide in his client's favor. Also, only better paid employees, probably those earning at least $20,000 to $30,000 a year, could get a lawyer to take their cases on a contingency fee basis, Beck says.

'This is back to the days of slavery. You're an employer's property — bought and sold and used up.'

—Lawyer Michael Cok

But Hjort disagrees that workers would be completely barred from courtrooms by the bill. Hjort says lawyers would still have enough incentive to take cases for people earning $18,000 a year.

The bill would create more certainty in the employer-employee relationship, he says.

He and other backers of the legislation say the time has come to rectify a situation that is unfair to employers. The bill would protect employers from having to spend a lot of money just to defend themselves, even if they prevail in the end.

Correa and other proponents point to a half-dozen or so cases in recent years in which plaintiffs received substantial damage awards.

"In the past there was nothing fair about the wrongful discharge issue," Correa says. "Employers were afraid to let employees go for any reason."

Besides repealing the covenant of good faith and fair dealing, Beck says he's also troubled by the part of the bill that would allow wrongful discharge suits only if an employer fired them for refusing to violate a law or an employer's own personnel policy.

Beck says the restriction to "anything written down" would make Montana one of the most regressive states in the country in employment law and allow many kinds of wrongful firings to go undefended.

According to a 1985 survey of state employment practices by the National Employment Law Institute, all but a handful of Southern states allow wrongful discharge suits when a worker refuses to violate "public policy," or the prevailing ethical and moral standards of the community, which aren't necessarily written in a law or a handbook.

Under House Bill 241, says Beck, Montana workers would lose protection in [illegible]owing kinds of circumstances:

—An employee might refuse a[illegible] employer's request to do or condone something the worker believes is ethically or morally wrong. This occurred in 1982 in a case in which an employee at Big Sky ski resort was fired for complaining that the area didn't take proper safety measures for controlling avalanches, says Beck. (The employee, Jonathon "J.C." Knaub, sued Big Sky resort over the firing, and was awarded $285,000 in damages by a Livingston jury in March 1984.)

—Because an employee has to work at least 1,000 hours a year for three years to file a wrongful discharge suit, part-time workers would lose all employment protection, says Beck.

"Part-time workers are done for," he says. "You tell that to mothers helping to support their families with part-time incomes."

—The bill would eliminate wrongful discharge suits for workers with less than three years on the job, giving employers an incentive, especially in physically demanding occupations, to turn over their workforces every three years, Beck says.

It could be especially hard on older workers, he argues. Even if a 55-year-old worker won a wrongful discharge suit, his damages would be limited to three years' pay. But his true damages, because he probably couldn't find another job, are likely to be far more, Beck says.

The lawyers said they were surprised the Bradley and Vincent supported the bill.

"The likes of people like Dorothy Bradley voting for this shocks the hell out of me," says Steve Ungar, a Bozeman lawyer and president of the state chapter of the American Civil Liberties Union.

"I can't believe (Bradley) would vote for a bill that epitomizes the antithesis of what she stands for," Cok says.

Bradley says she has "mixed feelings" about the bill, and that it "still needs amending."

Nevertheless, she says, "I'm sympathetic to the dilemma facing small businesses," which she says can't afford to defend wrongful discharge suits.

Moreover, Bradley says, the covenant of good faith and fair dealing in employment settings is only five years old in Montana law, developed by the Montana Supreme Court in the case Gates vs. Life of Montana.

Beck contends the covenant of good faith and fair dealing is at least 25 years old in Montana law, incorporated into the Unified Commercial Code, which says that businesses must deal with each other in good faith.

Spaeth acknowledges that the bill as it stands might be "a little harsher than it should be" and that the Legislature might have to "make some adjustments" in 1989.

Meanwhile, the Lisas of Montana's workforce could see their access to the court system highly restricted. Lisa, who eventually got another job as a legal secretary, says that without the right to sue her employer for wrongful discharge, she'd still be carrying the burden of guilt.

"It would have meant they (her employer) would have found me guilty and I would have carried that around the rest of my life," she says.

"All I wanted was to clear my name. I wanted my name made good."

WOMEN'S LOBBYIST FUND

Box 1099
Helena, MT 59624
449-7917

March 10, 1987
Testimony in opposition to HB 241

Mr. Chairman, Members of the Committee:

My name is Jackie Amsden and I represent the Women's Lobbyist Fund.

The Women's Lobbyist Fund opposes HB 241 because the bill so severely restricts the remedy for wrongful discharge. And the injury of wrongful discharge falls most heavily on women.

Most of the major Montana cases involving wrongful discharge were brought by women, including Shirley Krenshaw, Marlene Gatts, Jacquelyn Dare and Margaret Nye.

WLF is concerned about the provision in HB 241 that would exclude part-time employees from the remedy of wrongful discharge. Women are overrepresented in these part-time jobs -- we comprise 46,000 of the 63,000 part-time workers in Montana.-- that't over 70 percent. And it is on behalf of these 63,000 workers that we ask you to eliminate the 1,000 hours per year stipulation of HB 241. We oppose the entire bill, but at a minimum, the portion of subsection (2) of section (4) that sets a minimum hour requirement before a claimant has a remedy for wrongful discharge should be stricken from the bill because of it's disparate impact on women.

Should not a worker who works 15 hours a week for 20 years be entitled to at least the right to bring her case to court if she is suddenly fired?

Many of these part-time employees depend on their job just as much as full-time employees do -- especially the home-maker trying to raise a family at home and work to pay the bills at the same time.

Perhaps it is good to regulate wrongful discharge so that the employer can predict more accurately what his or her duties are. But don't provide this predictability at the expense of Montana workers.

The Women's Lobbyist Fund urges you to defeat this bill. Thank-you.

SENATE JUDICIARY
EXHIBIT NO. 11
DATE March 10, 1987
BILL NO. HB 241

NAME: Thomas E Richardson DATE: 3/10/87

ADDRESS: 600 So Main, Butte MT 59701

PHONE: 782-9121

REPRESENTING WHOM? Town Pump Food Stores

APPEARING ON WHICH PROPOSAL: HB 241

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: John F. Lynch DATE: 3-10-87

ADDRESS: P O Box 2265 Great Falls MT 59403

PHONE: 727-4224

REPRESENTING WHOM? Montana Employers Council a multi-EMPLOYERS Dang. GROUP

APPEARING ON WHICH PROPOSAL: HB 241

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: In my view the effect of this bill would assist organized labor in its organizing efforts. Unions would be able to use the fact that non-union employees have no guarantee of continued employment to entice those employees to join unions. The bill would create a climate of insecurity for all non-union employees in the State of Montana who have been employed for less than three years.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Jackie Amsden DATE: 3-10-87

ADDRESS: P.O. Box 1099, Helena 59624

PHONE: 449-7917

REPRESENTING WHOM? Women's Lobbyist Fund

APPEARING ON WHICH PROPOSAL: HB 241

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.