MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dave Brown, on March 20, 1989, at 8:10 a.m.

ROLL CALL

Members Present: All members were present with the following exception:

Members Excused: Rep. Kelly Addy

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: None.

HEARING ON SENATE BILLS 166, 167, 168, 169

Presentation and Opening Statement by Sponsor:

Sen. Esther Bengtson, Senate District 49 presented an exhibit that explained how the adjudication process began and that these bills are being introduced to clarify the adjudication process in Montana (EXHIBIT 1).

Sen. Bengtson presented exhibits for SB's 166, 167, 168, and 169 (See EXHIBITS 2, 3, 4, and 5).

Testifying Proponents and Who They Represent:

Jack Ross, Water Quality Committee
Jo Bruner, Executive Secretary, Montana Water Resources Assoc.
Ted Downey, Attorney Specializing in Water Law

Proponent Testimony:

Jack Ross stated that Montana has a very fine adjudication system. He said that he found that the statute did not have, as many of the states in the west do, a specific provision for the correction of clerical errors and decree. When they look at the need to adjudicate over 200,000 water rights in a time frame that is greatly collapsed by any other standards in the west, they have to recognize the possibility of such errors occurring and it is appropriate to provide mechanism for fixing those. The water courts had followed a practice where it was necessary for

administrative purposes to issue temporary preliminary decrees, before they were in position to enter what were provided in the statute for preliminary decrees. Another problem was that under existing law only final decrees can be administered. He proposed two amendments for SB 166 and SB 169 (EXHIBITS 6 and 7).

Jo Bruner stated that the Montana Water Resources Association supports these bills as they came out of the Senate.

Ted Downey stated he supports the amendments that have been generated by the Water Policy Committee. Many concerns that they had on the bills is SB 169 appears that the water court finds good cause to hold a hearing on every objection to a water right claim. Under the current law the statute says that the department can object to a water right claim or any person who is named in a decree can object to a claim and get a hearing without the water court finding good cause for that objection. Good cause is required to have a hearing by any other person who files objections that was not named in the decree.

Testifying Opponents and Who They Represent:

Richard Aldrich, Field Consultant, Department of Interior

Opponent Testimony:

Richard Aldrich stated that the function of SB 169 is that it gives the authority to the water courts for the issuance of preliminary decrees and it also defines how they may be used and administered. It provides for notice in the basin and provides for specific notice, prospectively by publication to water right holders outside a basin within a water shed. This provides for them an opportunity to appear an object to matters that may be determined in those decrees. Mr. Aldrich presented proposed amendments to SB 169 (EXHIBIT 8).

Questions From Committee Members: Rep. Brown asked Mr. Ross what he thought about the amendments. Mr. Ross stated that the question that Mr. Downey proposed dealt with a necessity for a good cause to be shown in order to object. He said he agreed that it is correct with respect to the original statute that the rights of the department people be named and the temporary preliminary decree to object did not require a showing of good cause. The distinction was made for other persons who may want to appear would have to show they had good cause for such an objection.

Rep. Brown asked Ed Steinmetz, Water Master for the Water Court, with the failure of his testimony for these bills does this mean he is neutral. Mr. Steinmetz stated that he didn't take a position because the Water Court is basically neutral and recognized its position as a court. They have worked in drawing up the amendments and although there are concerns,

there are still some concerns that do exist.

Rep. Brown questioned Mr. Aldrich if he was representing each of the five agencies as well with these statements or is this the general department divisions. Mr. Aldrich stated it is the departments position and the agencies as well.

Rep. Brown asked Mr. Aldrich if he had seen Mr. Ross' amendment that proposes to strike subsection C on SB 169. Mr. Aldrich stated that he has seen the amendments and said that his concern is more fundamental than simply with subsection C. It goes to the very process and the effect of the two track adjudication.

Rep. Brown commented to Mr. Aldrich that ten years ago when they set up the water adjudication process in Montana, they created a two track system at the federal governments request. Is he saying that he doesn't like the system the way it was done? Mr. Aldrich responded that what they are objecting to is the temporary decree process which they are proposing to codify, which was something invented by the court so that he court could move forward in areas where the adjudication they thought was going to be suspended. It was their impression that the adjudication would be completely suspended with respect to all parties in basins where they were negotiating entities particularly to the Indian tribes. The Water Court then invented the TPD process to allow the Water Court to issue decrees involving only the state appropriative claims in basins where there are reserved rights which are being negotiated.

Rep. Hannah asked Mr. Aldrich what would happen if they didn't pass the law. Would it improve their position with the department on the current practices of the court? Mr. Aldrich replied that they believe that if they don't pass the law it should send a message to the court that this is perhaps an authorized procedure. The court has been relying on the statute that allows them to enter other temporary decrees for the purposes of administration or for other purposes.

Rep. Brooke asked Mr. Ross if he could give an example of the procedures that he is referring to on page 4, lines 1-10. Mr. Ross stated that until a decree is issued for a claim, the claim constitutes prima facia evidence of the elements of a water right the person has claimed. In those basins where the adjudication has not reached the level of a temporary preliminary decree or preliminary decree, and under this provision would allow administration, then the District Court to consider the claim stated as prima facia evidence of the right in its determination of how administration would go forward. As soon as the Water Court has entered a temporary decree or a preliminary decree the material determined in the claim is no longer prima facia evidence for administrative purposes. Then they would move

to the decretal provision to determine how the administration will proceed.

Rep. Brown questioned Mr. Steinmetz if he would address Mr. Downey's concern on the good cause showing on page 6 in SB 169 and how does the court presently interpret that. Mr. Steinmetz stated that he wasn't aware of Mr. Downey's proposed amendment, but it is his impression that the way the court has read the statute and has interpreted it to this point, good cause is required for each of those entities for the department, anyone named in the decree, or for any other person. They construe good cause for the department to be very broad, they don't just require them to have a personal interest in the matter. The danger in taking out good cause requirement for people named in the decree is if there isn't good cause it gives them a reason to dismiss a harassing or spite objection.

Rep. Brown asked Mr. Downey if he would agree that the decision in this area is pretty much a policy decision on how it should apply. It is a question of whether the committee thinks it should apply across the board or be limited in the fashion that he would like. Mr. Downey commented that if the Water Court had been interpreting it the way they have, it appears it is working out satisfactorily, but the people aren't aware of that interpretation.

Closing by Sponsor: Sen. Bengtson stated that they must proceed. They feel that they have addressed the concerns of the federal government. The amendments, which address the federal government, were drafted by people from the Dept. of Natural Resources and from the Compact Commission that deals with the water rights. She commented that she doesn't feel they need anymore amendments.

DISPOSITION OF SENATE BILL 166

Motion: Rep. Stickney moved SB 166 BE CONCURRED IN, motion seconded by Rep. Nelson.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Eudaily moved SB 166 be amended as follows:

Page 7, line 15
Following: "DECREE"
Insert: ", or a person exercising a suspension under 85-2-217 and part of 7 of this chapter,"

Page 7, lines 16 through 18
Strike: "IF HE" on line 16 through "DECREE" on line 18

The amendments were seconded by Rep. Nelson and CARRIED unanimously.

Recommendation and Vote: Rep. Darko moved SB 166 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Nelson. Motion CARRIED with Rep. Boharski voting against the motion.

DISPOSITION OF SENATE BILL 167

Motion: Rep. Wyatt moved SB 167 BE CONCURRED IN, motion seconded by Rep. Darko.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Mercer moved the bill be amended as follows:

Page 2, lines 15 through 18
Strike: "A PERSON" on line 15 through the end of line 18

The amendment was seconded by Rep. Eudaily and CARRIED with Rep.'s Daily, Darko, Wyatt, Strizich, Brown, and McDonough voting Nay.

Recommendation and Vote: Rep. Knapp moved SB 167 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Stickney. Motion CARRIED with Rep. Daily voting against the motion.

DISPOSITION OF SENATE BILL 168

Motion: Rep. Nelson moved SB 168 BE CONCURRED IN. Rep. Wyatt seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: Question was called for on the motion and CARRIED unanimously.

DISPOSITION OF SENATE BILL 169

Motion: Rep. Wyatt moved SB 169 BE CONCURRED IN. Rep. Nelson seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Wyatt moved SB 169 be amended as follows:

Page 7, lines 7-16
Strike: subsection (c) in its entirety

The amendment was seconded by Rep. Brooke and CARRIED.

Rep. Mercer moved to amend as follows:

Page 7, lines 7-11
Strike: "HOWEVER," ON LINE 7 through the end of line 11.

The amendment was seconded by Rep. Boharski and CARRIED unanimously.

Rep. Mercer stated that they are getting into a situation where people are going to have to make a choice. There isn't any reason why someone should be giving up their rights to raise some further objections which would only be aimed at furthering the accuracy of the determination of the water rights. If there are some other rules dealing with race adjudicate out there then there shouldn't be any reason why they should just apply in their normal sense. Mr. Ross stated that to understand the concept of this piece of legislation they have to keep in mind that this is a judicial proceeding. The reason for saying they shouldn't have a right to take two bites out of the same cherry is just the same as any law suit he (Rep. Mercer) is faced with. He prepares his case on the best information he has. It is a contested matter he shouldn't be subjected to a second time to the same issue being tried by the same parties, and that is the principle reason why the provision is in the bill. It is simply to say if they have a matter which they litigate fairly and as honestly as they can then the claim should not be subjected a second time to somebody litigating the same issue.

Rep. Brown stated that line 7-11 states that they can have a trial and then appeal it. By removing that they are put under the situation whey they can have two trials on the same matter. He opposes the matter.

Rep. Brooke asked Mr. Steinmetz if in the preliminary decree stage, could some objector who had only used the temporary preliminary decree stage to object, could that preliminary decree then affect his right that was determined during the temporary preliminary decree. Mr. Steinmetz stated that if further objections are filed against that particular right, unless an objection is filed, the right can go all they way through the process to final decree without amendment.

Rep. Boharski asked Mr. Steinmetz what the process is if someone doesn't agree with the temporary preliminary decree and they want to object. Can they go directly from there to the District Court? Mr. Steinmetz stated that the whole process takes place before the Water Court. Basically the person would file an objection to the particular water rights stating what their objection is to that right.

A vote was taken on Rep. Mercer's amendment and CARRIED with Rep.'s Wyatt, McDonough, Darko, and Brown voting against the amendment.

Recommendation and Vote: Rep. Boharski moved SB 169 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Darko. Motion CARRIED with a unanimous vote.

DISPOSITION OF SENATE BILL 347

Motion: Rep. Strizich moved SB 347 be TABLED, motion seconded by Rep. Rice.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: A vote was taken on the motion to TABLE SB 347 and CARRIED unanimously.

DISPOSITION OF SENATE BILL 353

Motion: Rep. Nelson moved SB 353 BE CONCURRED IN, motion seconded by Rep. Rice.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: A vote was taken on the motion and CARRIED unanimously.

DISPOSITION OF HOUSE BILL 699

Motion: Rep. Aafedt moved HB 699 DO PASS. Rep. Stickney seconded the motion.

Discussion: Rep. McDonough reviewed with the committee the amended version of HB 699 (See Gray Bill, EXHIBIT 10).

Amendments, Discussion, and Votes: Rep. McDonough moved the amendments proposed by the subcommittee, motion seconded by Rep. Addy.

Rep. Wyatt stated that this situation is most advantageous for the woman and her baby, because what she is putting up front is $25 in anticipation that she has thrown away $25. If she hasn't and she has a child, that has a handicap and it is not a genetic handicap, but a handicap that is questionable as to how it was arrived in the delivery process, not at the fault of the physician. If they were to take it to the regular court system, this way her child has some potential

of getting some redress financial sustenance for the rest of its life, which it would not get if it took it through the system and found out that it was not a problem that the doctor did.

Rep. Addy stated that if there is a birth defect and if it appears that it is as a result of the delivery or medical care that the woman received during the pregnancy, they are in the fund.

A vote was taken on the gray bill amendments and CARRIED with all in favor.

Rep. Addy moved to amend section 7, page 8 (See EXHIBIT 11) of the bill. Motion seconded by Rep. Darko and CARRIED unanimously.

Recommendation and Vote: Rep. Addy moved HB 699 DO PASS AS AMENDED, motion seconded by Rep. McDonough. A voice vote was taken on the motion and CARRIED with all members in favor.

RECESS

Recess At: 11:30 a.m.
Reconvene At 1:11 p.m.

ADJOURNMENT

Adjournment At: 2:30 p.m.

Dave Brown

REP. DAVE BROWN, Chairman

DB/je

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DAILY ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date March 20, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN			X
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

STANDING COMMITTEE REPORT

March 20, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 166 (third reading copy -- blue) be concurred in as amended .

Signed: _____
Dave Brown, Chairman

And, that such amendments read:

1. Page 7, line 15.
Following: "DECREE"
Insert: ", or a person exercising a suspension under 85-2-217 and part 7 of this chapter,"

2. Page 7, lines 16 through 18.
Strike: "IF HE" on line 16 through "DECREE" on line 18

STANDING COMMITTEE REPORT

March 20, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 167 (third reading copy -- blue) be concurred in as amended .

Signed: _____
Dave Brown, Chairman

And, that such amendments read:

1. Page 2, lines 15 through 18.
Strike: "A PERSON" on line 15 through end of line 18

STANDING COMMITTEE REPORT

March 20, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 168 (third reading copy -- blue) be concurred in .

Signed: _____

Dave Brown, Chairman

STANDING COMMITTEE REPORT

March 20, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 169 (third reading copy -- blue) be concurred in as amended .

Signed: _____
Dave Brown, Chairman

And, that such amendments read:

1. Page 7, lines 7 through 16.
Strike: "HOWEVER," on line 7 through end of line 16

3-20-89

The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

REPRESENTATIVE DAVE BROWN
HOUSE DISTRICT 72

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COMMITTEES:
JUDICIARY, CHAIRMAN
LOCAL GOVERNMENT
RULES

TO: John Vincent, Speaker of the House

FROM: Dave Brown, Chairman, House Judiciary Committee

DATE: MARCH 20, 1989

SUBJECT: SENATE Bill

The House Judiciary Committee has TABLED SB 347.

DB/je

STANDING COMMITTEE REPORT

March 20, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 353 (third reading copy -- blue) be concurred in .

Signed: _____
Dave Brown, Chairman

641530SC.HBV

STANDING COMMITTEE REPORT

Mr. Speaker: We, the committee on Judiciary report that House Bill 699 (first reading copy -- white), with statement of intent attached, do pass as amended .

Signed: _____
Dave Brown, Chairman

And, that such amendments read:

1. Title, line 8.
Following: "SAVINGS TO"
Strike: "ORIGINAL CAPITALIZERS AND TO"

2. Title, lines 11 through 14.
Following: "CARE;" on line 11
Strike: remainder of line 11 through "PARTY;" on line 14

3. Title, lines 19 and 20.
Following: "A" on line 19
Strike: remainder of line 19 through "CARRIERS" on line 20
Insert: "TEMPORARY LINE OF CREDIT FROM THE GENERAL FUND, WITH THE ADVANCED MONEY TO BE REPAID"

4. Title, line 21.
Strike: "33-10-102,"

5. Page 2, line 16.
Page 5, line 22.
Page 6, lines 16 and 24.
Page 10, lines 1, 16, 18, 21, and 23.
Page 11, line 9.
Page 12, lines 11, 14, and 22.
Page 13, lines 2 and 18.
Page 16, line 12.
Page 17, line 7.
Page 18, lines 7 and 18.

Page 19, line 4.
Page 22, lines 8 and 12.
Page 23, lines 19, 21, 23, and 25.
Page 24, lines 20, 23, and 24.
Page 25, lines 9 and 25.
Page 26, lines 1, 2, and 14.
Page 27, lines 2, 19, and 21.
Page 30, line 24.
Page 31, lines 5, 20, and 24.
Page 32, lines 3 and 19.
Page 36, lines 9 and 16.
Page 39, line 7.
Page 40, lines 4 and 25.
Page 41, line 2.
Strike: "26"
Insert: "24"

6. Page 2, lines 19 and 20.
Following: "to" on line 19
Strike: remainder of line 19 through "of" on line 20
Insert: "lower insurance costs for physicians providing"

7. Page 2, line 20.
Following: "and"
Insert: "to increase"

8. Page 3, line 8.
Following: "provide"
Strike: "more full and fair"
Insert: "a no-fault system of"

9. Page 3, lines 9 through 15.
Following: "claimants" on line 9
Strike: remainder of line 9 through "exponentially" on line 15
Renumber: subsequent subsections

10. Page 4, line 7.
Following: first "a"
Insert: "severe"
Following: "health"
Insert: "and economic"

11. Page 4, lines 7 through 22.

Following: "problem" on line 7
Strike: remainder of line 7 through "services" on line 22
Insert: ", especially in rural areas, that may well continue unless appropriate steps are taken"
Renumber: subsequent subsections

12. Page 4, line 23.
Strike: "subsection (3)"
Insert: "subsections (1) and (2)"

13. Page 5, line 7.
Following: "of"
Insert: "physicians involved in obstetrical"

14. Page 5, line 8.
Following: "claims"
Strike: "against physicians"

15. Page 5, line 15.
Strike: "deprives"
Insert: "can deprive"

16. Page 6, lines 9 through 13.
Strike: subsection (4) in its entirety
Renumber: subsequent subsections

17. Page 6, line 21.
Page 7, line 17.
Page 10, line 9.
Page 15, line 10.
Page 17, line 20.
Page 18, line 23.
Page 22, line 15.
Page 24, line 5.
Page 27, line 17.
Page 41, line 3.
Strike: "24"
Insert: "22"

18. Page 7, lines 16 and 17.
Following: "physician" on line 16
Strike: remainder of line 16 through "physician" on line 17

19. Page 7, line 18 through page 8, line 6.
Strike: subsections (12) and (13) in their entirety
Renumber: subsequent subsections

20. Page 8, line 17 through page 9, line 2.
Strike: subsection (18) in it entirety
Renumber: subsequent subsections

21. Page 9, line 5.
Strike: "20"
Insert: "19"

22. Page 9, line 8.
Following: "person"
Insert: "or entity"

23. Page 9, lines 8 through 15.
Following: "having a" on line 8
Strike: remainder of line 8 through "claims" on line 15
Insert: "right of action under 27-1-501"

24. Page 9, lines 19 and 20.
Strike: subsection (22) in its entirety
Renumber: subsequent subsections

25. Page 10, line 13.
Strike: "Purpose"
Insert: "Fund created"

26. Page 11, line 3.
Following: "department"
Insert: "as a fiduciary,"

27. Page 11, line 6.
Strike: "department"
Insert: "departments"

28. Page 11, line 7.

Following: "department"
Insert: "and the department of insurance"

29. Page 11, lines 13 through 25.
Following: "is" on line 13
Strike: remainder of line 13 through end of line 25
Insert: "a loan of $6,300,000 from the state general fund to the primary pool of funds and a loan of $100,000 from the state general fund to the secondary pool of funds. The loans are not appropriations and must be repaid under [section 10], without interest."

30. Page 12, line 2.
Following: line 1
Strike: "primary pool of funds is fully nonassessable"
Insert: "participating physicians are not subject to assessment"

31. Page 12, line 5.
Page 19, line 5.
Page 24, line 3.
Strike: "16"
Insert: "15"

32. Page 12, lines 14 through 18.
Following: "26]" on line 14
Strike: remainder of line 14 through "$13,14]" on line 18
Insert: ", an annual surcharge that will keep the primary pool of funds actuarially sound. The statutory limitations and requirements on rate changes by primary medical malpractice carriers apply to the determination of surcharges"

33. Page 13, line 25 through page 14, line 7.
Strike: subsection (3) in its entirety
Renumber: subsequent subsections

34. Page 14, line 20 through page 15, line 5.
Strike: subsection (5) in its entirety
Renumber: subsequent subsection

35. Page 16, line 5.
Following: "period"
Insert: ", with interest at the judgment rate from the time of

deferral until payment,"
Following: "obligations"
Insert: "for administration of the primary pool and for noneconomic damages"

36. Page 16, line 6.
Following: "paid."
Insert: "The administrator shall increase the annual surcharge for the primary pool in order to ensure that proration of noneconomic damages does not occur for more than 3 years."

37. Page 16, lines 15 through 17.
Following: "funds" on line 15
Strike: remainder of line 15 through "sessions" on line 17

38. Page 16, lines 23 through 25.
Following: "sound" on line 23
Strike: remainder of line 23 through "physicians" on line 25
Following: "equally" on line 25
Strike: "among"
Insert: "between"

39. Page 17, lines 1 through 3.
Following: "(a)" on line 1
Strike: remainder of line 1 through "contributions" on line 3
Insert: "the general fund, as repayment of amounts withdrawn under the temporary line of credit,"

40. Page 17, line 4.
Strike: "contributions"
Insert: "amounts"

41. Page 17, line 16.
Following: "fund"
Strike: "has the power to"
Insert: "shall"

42. Page 17, lines 17 and 18.
Following: "reinsurance" on line 17
Strike: remainder of line 17 through "department" on line 18

43. Page 17, lines 20 and 21.
Strike: ":" on line 20 through "(1)" on line 21
Insert: ","

44. Page 17, line 22 through page 18, line 3.
Following: "final" on line 22
Strike: remainder of line 22 through "January 15" on page 18, line 3
Insert: "must be paid within 30 days"

45. Page 18, line 8.
Following: "primary"
Insert: "or secondary"

46. Page 18, lines 8 and 9.
Following: "on" on line 8
Strike: remainder of line 8 through "year" on line 9
Insert: "the first day of the following month"

47. Page 18, line 10.
Following: "(2)"
Strike: "The only claim against"
Insert: "A payment from"

48. Page 18, line 11.
Strike: "must"
Insert: "may"
Following: "be"
Insert: "made only upon"

49. Page 18, line 19.
Following: "(3)"
Strike: "The only claim against"
Insert: "A payment from"

50. Page 18, line 20.
Strike: "must"
Insert: "may"
Following: "be"
Insert: "made only upon"

51. Page 18, line 22.
Following: "judgment"
Insert: "or award"

52. Page 18, lines 24 and 25.
Following: "(b) a" on line 24
Strike: remainder of line 24 through "panel" on line 25
Insert: "duplicate original of a settlement entered into by the administrator on behalf of the secondary pool of funds"

53. Page 19, line 4.
Strike: "as"
Insert: "under insurance"

54. Page 19, lines 10 through 13.
Following: "administrator" on line 10
Strike: remainder of line 10 through "funds" on line 13

55. Page 19, line 15.
Following: "writing"
Strike: ", postage prepaid by certified mail,"

56. Page 19, line 17 through page 22, line 5.
Following: "settle." on line 17
Strike: remainder of line 17 through page 22, line 5
Renumber: subsequent sections

57. Page 22, line 24.
Following: "physician,"
Strike: "have one or more"
Insert: "be a member of one that has more than 50% of the"

58. Page 23, lines 11 and 12.
Following: line 10
Strike: line 11 through "limits." on line 12

59. Page 23, line 23.
Following: "26]"
Insert: ", except for claims made while the physician was qualified"

60. Page 24, line 16.
Following: "aggregate"
Insert: "as to each qualified physician"

61. Page 25, line 8.
Strike: "constitute"
Insert: "constitutes"

62. Page 25, lines 15 through 23.
Strike: subsection (6) in its entirety
Renumber: subsequent subsection

63. Page 26, lines 8 and 9.
Following: "claim" on line 8
Strike: remainder of line 8 through "funds" on line 9

64. Page 27, line 1.
Strike: "five"
Insert: "four"

65. Page 27, line 2.
Strike: "The"
Insert: "Expenses for travel and lodging and the administration of the"

66. Page 28, line 10.
Following: "warranted"
Insert: "under 37-3-323 through 37-3-328 and may take action under those sections"

67. Page 28, line 16 through page 30, line 21.
Strike: section 22 in its entirety
Renumber: subsequent sections

68. Page 33, lines 4 through 8.
Following: "physician." on line 4
Strike: remainder of line 4 through "panel." on line 8

69. Page 33, line 9.

Following: "(2)"
Strike: remainder of line 9 through "at"
Insert: "At"

70. Page 33, line 10.
Following: "treatment"
Insert: "by a participating physician"

71. Page 33, lines 11 through 14.
Following: "care," on line 11
Strike: remainder of line 11 through "to" on line 14

72. Page 33, line 15.
Following: "patient"
Insert: "is eligible to participate in the secondary pool and becomes liable for the payment of a designated premium equivalent"

73. Page 33, line 16.
Following: "$25"
Strike: ". The amount"
Insert: ", is nonrefundable, and"

74. Page 33, lines 18 through 20.
Following: "council." on line 18
Strike: remainder of line 18 through "funds." on line 20

75. Page 33, lines 21 through 25.
Following: "time" on line 21
Strike: remainder of line 21 through "charged" on line 25
Insert: "of initial medical treatment related to the birthing process or obstetrical care, must be informed by the physician of the provisions of subsection (2) and this subsection. The physician shall at that time give the patient a pamphlet that clearly and adequately describes the provisions of [sections 1 through 24] and advises the patient to contact an attorney if the patient believes the patient has a malpractice claim related to the birthing process or obstetrical care. The pamphlet must be written by the state bar of Montana, and the primary pool shall pay the cost of publishing and distributing the pamphlet. The physician shall add the designated premium equivalent to the first bill sent to the patient and inform the patient at the

time of the initial medical treatment that the amount will be added to the bill"

76. Page 34, lines 1 and 2.
Following: "premium" on line 1
Strike: remainder of line 1 through "funds" on line 2

77. Page 34, lines 6 and 7.
Following: "(4)" on line 6
Strike: remainder of line 6 through line 7

78. Page 34, lines 8 and 9.
Following: "(a)" on line 8
Strike: remainder of line 8 through "the" on line 9
Insert: "The"

79. Page 34, line 10.
Strike: "immediately"
Insert: ", within 30 days of the time of initial medical treatment,"

80. Page 34, lines 12 through 15.
Following: "premium." on line 12
Strike: remainder of line 12 through "funds." on line 15

81. Page 34, line 16.
Strike: "subsequent"
Insert: "Subsequent"

82. Page 34, line 18.
Strike: "shall"
Insert: "may"

83. Page 34, line 23 through page 35, line 5.
Following: "claim." on line 23
Strike: remainder of line 23 through "effective." on page 35, line 5

84. Page 35, line 12.
Following: "claim."

Insert: "The arbitration panel must be composed of an attorney, a physician, and a professional arbitrator. The professional arbitrator must be knowledgeable in workers' compensation law and is the chairman of the panel."

85. Page 35, line 24 through page 36, line 1.
Following: "agreement" on line 24
Strike: remainder of line 24 through "claim," on page 36, line 1

86. Page 36, line 9.
Strike: "or a hospital"

87. Page 36, lines 11 through 13.
Following: "patient" on line 11
Strike: remainder of line 11 through "incident" on line 13

88. Page 36, line 14.
Strike: "The"
Insert: "If a claim has not been filed under subsection (7), the"

89. Page 36, line 18 through page 37, line 4.
Following: "section" on line 18
Strike: remainder of line 18 through "panel" on page 37, line 4

90. Page 37, line 9.
Following: "section are"
Insert: ":"

91. Page 37, lines 10 through 23.
Strike: lines 10 through 23 in their entirety
Insert: "(i) medical, paramedical, and hospital expenses incurred to the date of the award;

(ii) future medical, paramedical, and hospital expenses, computed in the manner provided in 39-71-704 and rules implementing that section;

(iii) a sum equal to one and one-half times the state's average weekly wage for the period of the disability; and

(iv) reasonable attorney fees incurred in bringing the claim before the arbitration panel, not to exceed $125 per hour."

92. Page 38, line 1.
Strike: "or is entitled to receive"

93. Page 38, lines 8 through 10.
Strike: subsection (c) in its entirety

94. Page 38, line 12.
Strike: "an annual"
Insert: "a monthly"

95. Page 39, line 20.
Strike: "(9) and"
Insert: "(7) through"

96. Page 39, lines 22 and 23.
Following: "is" on line 22
Strike: remainder of line 22 through "injury" on line 23
Insert: "the period provided in 27-2-205"

97. Page 40, line 3.
Following: "report"
Insert: "in writing"
Following: "each"
Insert: "regular"

98. Page 40, lines 23 and 24.
Following: "If" on line 23
Strike: remainder of line 23 through "if" on line 24

99. Page 41, line 4 through page 42, line 18.
Strike: section 29 in its entirety
Renumber: subsequent sections

100. Page 45, lines 10 and 11.
Following: "32." on line 10
Strike: remainder of line 10 through "dissolution" on line 11
Insert: "Dissolution"

101. Page 45, lines 12 through 23.
Following: "association." on line 12
Strike: subsections (1)(a) and (1)(b) in their entirety

102. Page 45, line 24.
Strike: "(2)(a)"
Insert: "(1)"

103. Page 46, line 3.
Strike: "(i)"
Insert: "(a) ["
Strike: "chapter"
Insert: "act]"

104. Page 46, line 5.
Strike: "(ii)"
Insert: "(b)"

105. Page 46, line 11.
Strike: "(b)"
Insert: "(2)"

106. Page 46, line 25 through page 47, line 6.
Following: "fund." on line 25
Strike: remainder of line 25 through "accrues." on page 47, line 6

EXHIBIT 1
DATE 3-20-89
SB 166, 167, 168 & 169

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS

March 1989

1. The Montana Water Courts are organized into four divisions:

   - the Upper Missouri River Basin (Chief Judge W.W. Lessley);
   - the Lower Missouri River Basin (Judge Bernard W. Thomas);
   - the Clark Fork River Basin (Judge Leif Erickson); and
   - the Yellowstone River Basin (Judge Roy C. Rodeghiero).

2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.

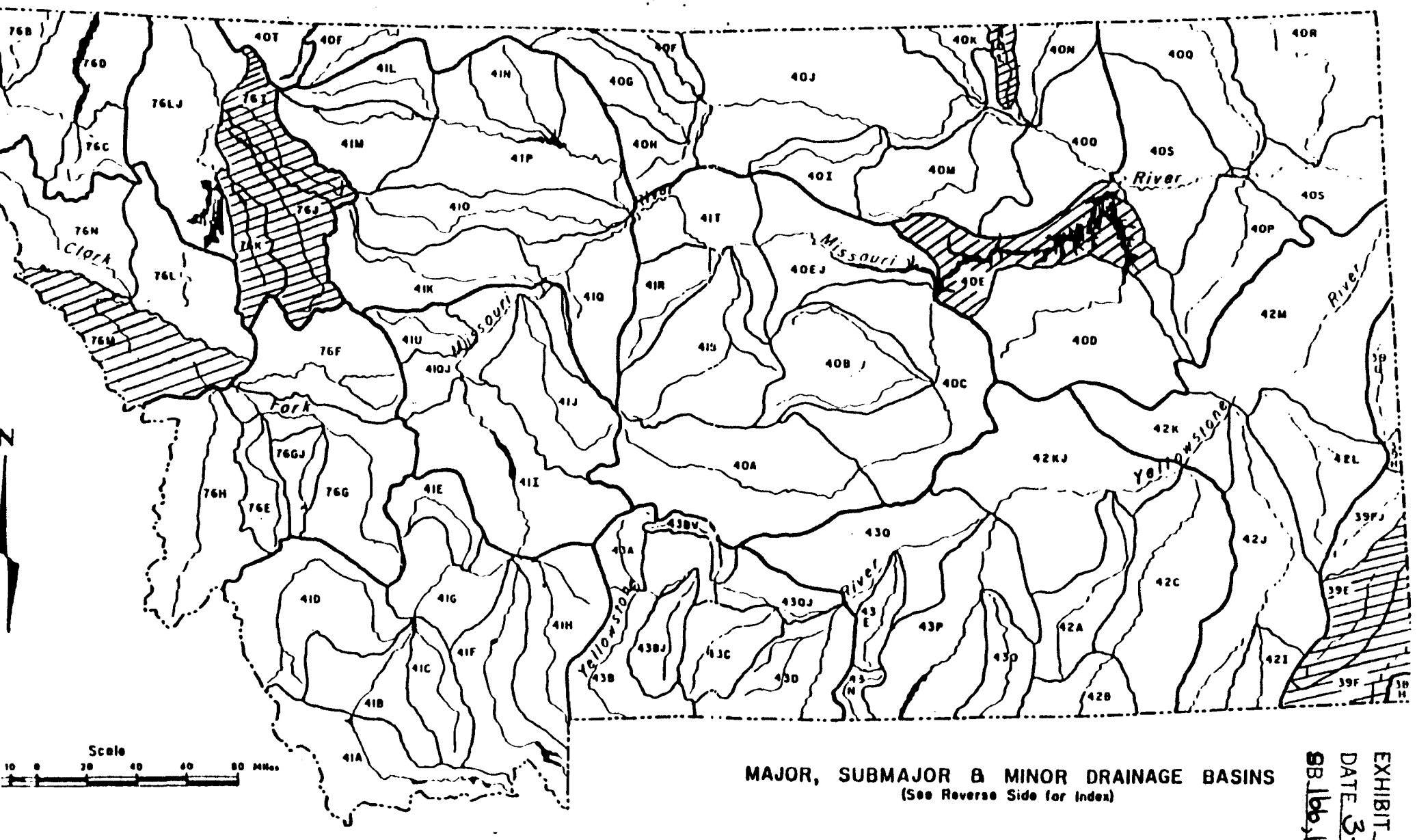
3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.

4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.

Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.

5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.

6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).



MAJOR, SUBMAJOR & MINOR DRAINAGE BASINS
(See Reverse Side for Index)

EXHIBIT 1
DATE 3-20-89
SB 196, 167, 168 + 169

EXHIBIT 2
DATE 3-20-89
SB 166

The Water Rights Adjudication Bills

By Request of the Water Policy Committee
Senator Esther Bengtson, sponsor
March 20, 1989

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process. The consultant's report, and the committee's final conclusions, stress that the adjudication process is working properly but that some minor legislative changes are needed to ensure that the results sought by the legislature in 1979 are achieved.

Several technical amendments are added to these bills by the Senate Agriculture Committee as a result of discussions and consensus recommendations offered by technical persons attached to the Water Policy Committee, the Water Courts, the DNRC, and the Reserved Water Rights Compact Commission.

I. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree or a preliminary decree, as modified after objections and hearings. Under existing law, only final decrees may be administered.

The bill also places water rights administration solely with the district courts, thereby emphasizing the water courts' principal adjudication function. The major sections of the bill are sections 2, 3, 5, 6 and 7.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering them. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree, as modified after objections and hearings.

Section 3

This section is fundamental to the bill. Note that the district court has jurisdiction and that the district court can administer not only a final decree but also temporary preliminary and preliminary decrees.

EXHIBIT 2
DATE 3-20-89
SB 166

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its contents until a final decree is issued. This amendment modifies the prima facie status of a claim or amended claim for administration purposes only by stating that the claim is superseded by the issuance of a temporary preliminary decree or preliminary decree, as modified after objections and hearings. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section amends 85-2-406 to describe how the district court shall resolve water distribution controversies and enforce decrees. The Senate Agriculture Committee amendments restate much of the original statute and provide for enforcement of temporary preliminary and preliminary decrees in subsection (2).

Again, the district courts supervise this process. If the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-July 1, 1973 right would be referred to the water courts.

Subsection (5) provides an appeals process to persons who might be harmed by the administration of a temporary preliminary or preliminary decree. Otherwise, the person would have to wait until the final decree is issued. [Note amendments]

Section 7

The amendments allow for the appointment of a water commissioner to administer or enforce a temporary preliminary, preliminary or final decree.

Section 11

The applicability section allows a person whose rights are already determined in an existing temporary preliminary decree or preliminary decree to petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree (a mini-reopening provision).

Section 12

The effective date for this bill and Senate Bills 167 and 169 is when the last bill receives final action.

EXHIBIT 3
DATE 3-20-89
SB 167

II. Senate Bill 167

Section 1 of the bill would be a new section in Title 85, chapter 2, part 2 (the adjudication laws).

Subsection 1

Subsection 1 states the general purpose of the bill. At some time the Water Courts must reopen every preliminary or final decree that has not been noticed throughout the water divisions. This ensures that persons throughout the general stream basin will have a chance to participate in the adjudication process and bolsters the probability that Montana's adjudication process will withstand any federal challenge.

Subsection 2

The limitation on who can object when a decree is reopened, as agreed to by the technical representatives mentioned earlier and adopted by the Senate Agriculture committee, is stated in subsection 2(b) of section 1:

> A person may not raise an objection to a matter in a reopened decree if he was a party to the matter when the matter was previously litigated and resolved as the result of a previous objection process.

Thus, a person is precluded from objecting to a matter in a reopened decree is reopened if he actively litigated the matter as an issue during previous objections and hearings.

Subsections 3 and 4

This section describes notice requirements for reopened decrees. Notice by mail must be sent to each person or entity with a claim, permit or reservation in the basin at issue. In addition, notice of the decree's availability must be published in at least 3 newspapers geographically distributed in the general stream basin in which the basin is located.

Subsection 5

A longer 180-day time period, with possibly two 90-day extensions, is provided for objections. This helps ensure ample opportunity for participation by affected persons.

Subsections 6, 7 and 8

Subsection 6 ensures notice to claimants of objections to their claims. Subsection 7 allows the water judge to dismiss the objection or to modify claims based on the evidence before him. Subsection 8 reinforces that appeals are allowed from a final decree. In addition, an appeal is available under SB 166 if the decree is being enforced.

EXHIBIT 4
DATE 3-20-89
SB 168 and 169

III. Senate Bill 168

This bill adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

The amendment added as subsection 4 ensures that the final decree will have a list of the existing rights and their relative priority in a form determined appropriate by the water judge.

IV. Senate Bill 169

Senate Bill 169 provides explicitly that the Water Courts may issue temporary preliminary decrees (a practice already occurring) and modifies the notice requirements and the objections and hearings process.

Section 1

New subsection 1 is a new version of the old subsection 5 (now stricken). The subsection states that a temporary preliminary decree may be issued by water courts as needed to allow orderly administration or adjudication of water rights.

Subsection 6 describes the relationship between the temporary preliminary decree and preliminary decree. The temporary preliminary decree must be used in issuing the preliminary decree, though the preliminary decree, after objections and hearings, supercedes the temporary preliminary decree.

Section 2

Notice of a preliminary decree must be published throughout the general stream basin prior to the issuance of a final decree.

Section 3

The objections hearings process is largely identical to the process provided for the reopening of decrees (SB 167). The limitation on who may object at the preliminary decree stage is also conceptually the same as the limit used in SB 167:

> ...a person may not raise an objection to a matter in a reopened decree if he was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree.

Subsection 2 extends the time period for filing objections and requests for hearing to 180 days after notice is given of the

EXHIBIT 5
DATE 3-20-89
SB 169

decrees. Two 90-day extensions, for good cause shown, are also provided. This helps to ensure that adequate time is available for interested parties to review the decree.

The amendments in the remainder of the section simply apply existing law to temporary preliminary decrees.

Section 4

Section 4 is a new amended section providing that appeals from a final decree may be based on objections raised to or rights affected by a temporary preliminary decree.

Section 5 is a coordination instruction that would remove enforcement language if SB166 dies. [However, note the proposed amendment to strike section 3(1)(c)....page 7, lines 12-16].

EXHIBIT 6
DATE 3-20-89
SB 166

Amendments to Senate Bill No. 166
Third Reading Copy
For the House Judiciary Committee
Requested by Senator Bengtson
March 17, 1989

1. Page 7, line 15.
Following: "DECREE"
Insert: "or a person exercising a suspension under part 7 of this chapter"

2. Page 7, lines 16 through 18.
Following: "(2)" on line 16
Strike: remainder of line 16 through DECREE" on line 18

These amendments would allow appeals of enforcement actions to the Supreme Court by 1) a person whose rights and priorities are determined in a temporary preliminary decree or preliminary decree or 2) a tribe or federal agency exercising a suspension under part 7.

appr2

EXHIBIT 7
DATE 3-20-89
SB 169

Amendments to Senate Bill No. 169
Third Reading Copy

Requested by Senator Bengtson
For the House Committee on Judiciary

March 17, 1989

SB 169
1. Page 7, lines 12 through 16.
Strike: subsection (c) in its entirety

This amendment removes a limitation on who may object to enforcement of a temporary preliminary or preliminary decree. The remaining limitation is stated in section 6 of Senate Bill 166. Subsection (2) of this section (85-2-406) states that:

> "any party to the controversy or any person whose rights are or may be affected by enforcement of [the temporary preliminary or preliminary] decree may petition the district court for relief."

EXHIBIT 8
DATE 3-20-89
SB 169

HOUSE JUDICIARY COMMITTEE

Dave Brown, Chairman	Linda Nelson	Ralph Eudaly
Kelly Addy, Esq.	Jessica Stickney	Budd Gould
Vivian Brook	Bill Strivich	Tom Hannah
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Mary McDonough, Esq.	William Bohavski	Jim Rice

Mr. Chairman and Members of the House Judiciary Committee:

My name is Richard Aldrich and I am the Field Solicitor for the Department of the Interior. I am here today to present the Department's views on proposed legislation and to express concern about existing trends and practices of the Montana Water Court.

As the Field Solicitor, I am the supervising attorney for the United States Department of the Interior for Montana, Wyoming, North and South Dakota. The Department has five agencies which administer water programs in Montana: The Bureau of Land Management, Bureau of Reclamation, Bureau of Indian Affairs, National Park Service and Fish and Wildlife Service. For an additional discussion of the nature of our legal concerns regarding the proposed legislation dealing with the adjudication of water rights, please refer to the letter to Senator Galt from the Department of Justice dated February 9, 1989.

The United States has a significant stake in the Montana General Stream Adjudication. The United States has filed approximately 32,000 claims for water rights in the Montana Adjudication and has filed approximately 5000 objections to claims. In addition, the Department of the Interior has the responsibility for negotiating with the Reserved Water Rights Compact Commission directly for the reserved rights of the Park Service, Fish and Wildlife Service, the Wild and Scenic Missouri River for the Bureau of Land Management and is participating along with Tribal delegations from eight Indian reservations in negotiations. The United States Department of Agriculture has both appropriative and reserved water right claims in the Adjudication, but it has not participated in preparation of the following comments.

This committee has before it four bills proposing to amend various sections of the adjudication statute. Because this legislation directly affects the Department of Interior and its water using agencies in Montana, we have prepared comments for this hearing. My remarks today are directed towards S.B. 169, although some of the same concerns apply to the other three bills.

S.B. 169 allows a water judge to issue a Temporary Preliminary Decree, if it is necessary for the orderly ADJUDICATION or administration of water rights.

The Department believes that this amendment to the Montana Adjudication Statute will lead to a piecemeal adjudication in violation of Federal Law and is inconsistent with the present adjudication statute

The success of the Montana General Steam Adjudication necessarily depends on accurate decrees of all water uses in the State. The need for adjudicating all water uses is a prerequisite for joining the United States in the litigation. Indeed, the United States is a necessary party due to the large ownership of lands and water rights by the United States in Montana. Congress has provided a limited waiver of sovereign immunity allowing the joinder of the United States, and its water rights, in water adjudications through the McCarran Amendment (43 USC 666). That Federal Statute allows the joinder of the United States in water adjudication actions that are comprehensive; i.e. all water right claimants are joined and all rights are decreed.

The Department believes that, in order to meet the comprehensiveness requirement of the McCarran Statute, the State is obligated to wait and hold its hearings and evidentiary proceedings when all claims in a particular basin can be heard at once. To wait until all claims are before the Water Court assures an adequate inter sese in rem proceeding. To proceed otherwise breaks up the adjudication into unrelated pieces. Such a piecemeal process forecloses the comprehensive nature of the Montana adjudication and imperils the States' jurisdiction under the McCarran Amendment. Thus the State will have removed the United States as a party to the Adjudication.

S.B. 169 codifies the present practice of the Water Court which has expedited the adjudication process without regard to the suspension provisions of the Adjudication statute. Thus S.B. 169 will assure that the Water Court may continue to issue decrees without the participation of or the authority to bind all water users.

The result of the existing Water Court TPD procedure is a series of decrees going from one point of least resistance to the next. The ramifications of this process are inadequate, often inaccurate and unenforceable decrees upon which local water users will mistakenly rely. The procedure being advanced today is not what this legislature envisioned ten years ago. S.B. 169 exacerbates the problem - it does not fix it.

When the legislature passed S.B. 76 in 1979, it provided for a clean judicial process that allowed the Water Court to use the Department of Natural Resources and Conservation for technical expertise. The use of DNRC complemented the legislature's

mandate to the Water Court to facilitate an expeditious adjudication of water rights. However, the legislature did not foresee two conflicts.

First, the legislature provided for the suspension of all adjudication proceedings on claims for federal and Indian reserved rights in water divisions in which there are reserved right claims subject to negotiations. That suspension precludes the routine decreeing of water basins. The Water Court began by issuing decrees not subject to negotiations but soon ran out of basins with water rights not involved in negotiation. As a solution, the Court instituted Temporary Preliminary Decrees on all the state law based rights in a basin. We believe that this bifurcation of the adjudication violates both federal and state law. By allowing state law claimants to litigate in the absence of federal law claimants, the Adjudication has degenerated into a piecemeal adjudication. The result is a perception by water users that their rights are adjudicated and the creation of a solidified wall of opposition to later adjudicated federal claims. S.B. 169 encourages this reaction by allowing an entire TPD to be conclusive, enforceable and administrable according to its terms among parties ordered by the water judge under MCA 85-2-406. There is no fairness nor due process in this TPD process.

State law is best expressed at Montana Code Annotated 85-2-701:

> "Because the water and water rights within each water division ARE INTERRELATED, it is the INTENT of the legislature to conduct UNIFIED PROCEEDINGS for the general adjudication of existing water rights under the Montana Water Use Act."

It is clear that this provision of State law does not contemplate a bifurcated proceeding, and the Department of the Interior has relied upon that intent, especially for Indian reserved water rights. S.B. 169 will change that course in mid-stream.

The drafters of the Adjudication Statute understood the time consuming nature of litigation and negotiation. In fairness, they recognized that the United States could not be required to do both. That is why they enacted MCA 85-2-217 to suspend all proceedings. If you adopt legislation requiring the United States to negotiate and litigate at the same time, you will have imposed a unique burden on the United States that is not shared by any other water right claimant. You may force the United States to seek judicial relief from this discrimination and to terminate the negotiation process. It appears as though you will have impliedly repealed the negotiation provision. We can not reconcile the suspension provision and the codification of the TPD procedure.

The second conflict not foreseen by the legislature in 1979 was the inaccuracy and inflated nature of many of the claims filed. The legislature correctly presumed that many claimants would file

their claims without legal or technical assistance. Yet the statute contemplates a quick, clean judicial process. The Water Court quickly realized that most claims were ill-prepared and incomplete. The Court took advantage of the technical assistance of the DNRC to clarify claims but then met a new problem. Once the claims were clarified by filling in all the blanks with relevant information, the Court learned that the information often was inaccurate. The Water Court's recognition of these inaccuracies and its obligation to resolve them has directly run afoul of the quick, clean judicial process and the legislature's mandate to the Water Court to expedite the adjudication. The Water Court has struggled with this issue.

We note that initially the Water Court consciously avoided basins with Indian Reserved Rights. S.B. 169 as originally filed proposed to give legislative approval to decreeing basins which contained Indian reserved right claims. That proposal was met with strong objections by persons working in the Indian negotiations. Now the amended bill allows "TPD's" where necessary for the orderly ADJUDICATION or administration of water rights. The fact is the Water Court has moved so quickly that the only basins left are ones containing federal or Indian reserved water right claims that are being negotiated under the state statute which suspended "all proceedings" until there can be a "unified proceeding." Thus S.B. 169 is as a practical matter legislative approval for decreeing basins containing Indian reserved water rights. The Department opposes the enactment of S.B. 169 for this reason among others.

I do not want to leave the impression that water users in basins containing federal or Indian reserved rights are unable to administer water use until the United States is an active party. The Montana statute provides for an exception at MCA 85-2- 231.

There may well be occasions when there is a genuine need for an interlocutory or temporary determination in a basin, pending the general adjudication of all water interests in that basin. This, however, is very different from the two-track system of adjudication which has been employed by the Water Court to date, and which will be formalized if S.B. 169 becomes law. We have already suggested to the Montana Supreme Court that the following language be added to the Water Claims Examination Rules in order to allow for interlocutory decrees in appropriate situations:

> Pursuant to M.C.A. § 85-2-231(1)(d), the Water Court may issue an interlocutory decree or other temporary decree pursuant to § 85-2-231 or if such decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. Prior to issuing such an interlocutory or other temporary decree, the Water Court shall make a determination, supported by findings of fact and conclusions of law, that such a decree is authorized by

§ 85-2-231 or is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. This determination will be upheld if supported by substantial evidence.

Please see the United States comments to the Montana Supreme Court on the Interim Claims Examination Rules.

I am sure that you will hear that the United States must not really have complaints about TPD's because they have participated in nearly every one decreed to date. That is true - we have, but we do so under protest and with a concern that the appearance of one federal agency using state law based water rights may prejudice another federal agency using reserved rights claims merely because both sets of claims legally are held by the United States. S.B. 169 may force the resolution of this conflict. Section 3 of the proposed bill discusses later objections in the Preliminary Decree process. On page 7 lines 5 through 11 the bill reads:

A PERSON DOES NOT WAIVE THE RIGHT TO OBJECT TO A PRELIMINARY DECREE BY FAILING TO OBJECT TO A TEMPORARY PRELIMINARY DECREE. HOWEVER, A PERSON MAY NOT RAISE AN OBJECTION TO A MATTER IN A PRELIMINARY DECREE IF HE WAS A PARTY TO THE MATTER WHEN THE MATTER WAS PREVIOUSLY LITIGATED AND RESOLVED AS THE RESULT OF AN OBJECTION RAISED IN A TEMPORARY PRELIMINARY DECREE.

We find this language to be vague.

Who is a party?
Is it the United States or the individual federal agencies?
The United States is the federal party and as such it represents the interests of its various agencies.
Is there an exemption for agencies that negotiate?
What do you mean by "matter?"
Does this mean an entire TPD or entire claim or parts of the water right?
If the United States initially objects to flow rate, is the United States later foreclosed from objecting to acreage or priority date in the same claim?
If the United States on behalf of one agency appears in a TPD, can the United States on behalf of another agency appear in the preliminary decree?

The vagueness in this provision may cause the Department to pause and seriously reconsider its participation in TPD's. We note that S.B. 167 contains the same vague language.

A good example of the basic unfairness of the current Water Court procedure, which S.B. 169 proposes to codify is Section 3(c). We note this provisions conflict with S.B.166 Section 6.

(c) A PERSON WHO HAS RECEIVED NOTICE OF THE AVAILABILITY OF A TEMPORARY PRELIMINARY DECREE WAIVES THE RIGHT TO OBJECT TO THE ENFORCEMENT OF THE TEMPORARY PRELIMINARY DECREE UNDER 85-2-406 IF HE FAILED TO OBJECT TO A TEMPORARY PRELIMINARY DECREE.

Thus if the United States must forego participation in Temporary Preliminary Decrees because its agencies' staffs are negotiating and because we do not want to jeopardize our ability to scrutinize every claim, we can be precluded from objecting to the enforcement or administration of our state law based claims that were included in a TPD. We have serious concerns as to the fairness of this catch 22 provision. Also, we do not believe the State has the authority to administer United States water rights prior to a final decree.

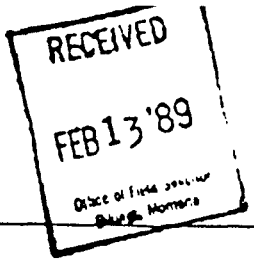
In sum, we are concerned with the effects of past and future TPDs on 1) our capacity to continue negotiations rather than resort to litigation; 2) fairness and economy of process to all litigants, but especially the United States whose claims would be decreed in a later proceeding; and 3) State court jurisdiction over the United States pursuant to the McCarran Amendment.

If this legislation is passed as presently written, the Solicitors Office will have to advise the Secretary that continued participation in TPDs could have serious consequences on the rights of the United States. The United States is one of the largest claimants and has been one of the largest objectors in the adjudication thus far. We believe it has been through the efforts of the United States through the objection process that a degree of accuracy has been maintained in the adjudication. If S.B. 169 is passed, the State will force the Department of the Interior to reevaluate the Montana Adjudication as a McCarran Amendment proceeding.

Thank You.

Exhibit # 8
3/20/89

U.S. Department o



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90-6-2-1

Washington, D.C. 20530

February 9, 1989

Senator Jack E. Galt
Chairman
Reserved Water Rights Compact Commission
1520 East Sixth Avenue
Helena, Montana 59620-2301

Dear Senator Galt:

Re: Montana Water Adjudication — Comments on Proposed Legislation Respecting Temporary Preliminary Decrees.

This is in reference to your letter dated December 28, 1988, to the Interior Department Field Solicitor in Billings, inviting comments on proposed legislation regarding the statewide water adjudication process. We offer the comments below on behalf of the Department of Justice, which has the primary responsibility of representing the United States and its agencies in the water proceedings.

The draft bills which have been brought to our attention deal with reopening decrees of water rights, the use of temporary preliminary decrees, the administration of the latter form of decree, and correction of clerical errors in decrees. The following is not an exhaustive recitation of all of our views on these subjects. Rather, we note here matters of special concern, particularly on the subject of temporary preliminary decrees.

I. Formalized Use of Temporary Preliminary Decrees (TPD's). -- The comments under this heading relate to the draft entitled "An Act Providing Clear Authority for the Issuance of Temporary Decrees in Those Basins in Which Adjudication of Claims for Federal or Indian Water Rights Is Precluded," etc. That bill does what its title states: it expressly authorizes the issuance of TPD's in any basin in which adjudication of claims for federal or Indian reserved water rights is prevented by M.C.A. § 85-2-217, which suspends the adjudication of such water rights while they are being negotiated with the Compact Commission. The bill also states that the TPD shall address all claims in the basin except those affected by the suspension. (See proposed § 85-2-231(d)(5).)

A. TPD's Lead to a Piecemeal Adjudication. -- The Montana Water Court has been routinely entering TPD's for years. The draft bill would formally sanction that practice. We oppose this provision because, as explained below, the routine use of temporary preliminary decrees in the Montana adjudication is leading to a piecemeal adjudication of water rights, contrary to the McCarran Amendment, 43 U.S.C. § 666.

The McCarran enactment is a waiver of sovereign immunity which authorizes the joinder of the United States in a general stream adjudication. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). As a statute consenting to suit against the United States, any conditions which Congress has attached to that consent must be strictly observed, and exceptions thereto must not be lightly implied. Block v. North Dakota, 461 U.S. 273, 287 (1983).

The McCarran statute consents to suit against the United States on the condition that the proceedings be comprehensive, in which all water claimants are joined and all rights to the use of water are decreed. Dugan v. Rank, 372 U.S. 609, 617-619 (1963) (McCarran Amendment did not authorize suit where all claimants to water rights in San Joaquin River were not joined as parties and priorities were not to be determined among all parties). The McCarran statute was designed to avoid the adjudication of water rights in a "piecemeal" fashion. Colorado River, 424 U.S. at 819.

The utilization of TPD's to adjudicate rights based upon state law, while federal reserved rights are subject to the negotiation process of M.C.A. §§ 85-2-701 through -705, indicates that in practice Montana's water adjudication is devolving into a piecemeal adjudication, against the intent of the McCarran Amendment.

In actuality, since the initiation of the Senate Bill 76 proceedings, little progress has been made in achieving settlements of Indian and federal reserved rights.[1/] Nonetheless, the adjudication of those rights has been stayed during the pendency of formal "negotiations" between the Compact Commission and federal agencies and Indian Tribes, by virtue of § 85-2-217. In the meantime, the Water Court has been proceeding with haste to determine all state law water rights, chiefly through the device of TPD's. In effect, state law water rights and federal reserved rights are being processed under different statutory regimes, and it is an open question whether the Water Court will be able, at some time in the distant future,

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1/ The Northern Cheyenne Tribe has recently made a settlement proposal to the Compact Commission. We hope that the Commission is prepared to begin negotiations soon on this matter.

to integrate the determination of these two classes of rights into unitary final decrees. Thus, the piecemealing of the Senate Bill 76 process could have unfortunate consequences several years down the road.

The foregoing does not mean that temporary decrees should never be entered in advance of the preliminary decree authorized by M.C.A. § 85-2-231. There may well be occasions when there is a genuine need for interlocutory or temporary relief in a basin pending the general adjudication of all water interests in that basin. This, however, is very different from the two-track system which has been employed in the adjudication to date, and which will be formalized if the bill becomes law. We have already suggested to the Montana Supreme Court that the following language be added to the Water Claims Examination Rules in order to allow for interlocutory decrees in appropriate situations:

> Pursuant to M.C.A. § 85-2-231(1)(d), the Water Court may issue an interlocutory decree or other temporary decree pursuant to § 85-2-321 or if such decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. Prior to issuing such an interlocutory or other temporary decree, the Water Court shall make a determination, supported by findings of fact and conclusions of law, that such a decree is authorized by § 85-2-321 or is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. This determination will be upheld if supported by substantial evidence.

See United States' Comments on Water Claims Examination Rules at 11, In re DNRC, No. 86-397 (Mont. Sup. Ct.). The suggested language addresses the need for an interim decree before the preliminary decree, while avoiding the routinized use of TPD's.

In addition, the proposed bill would apparently permit TPD's to be issued for basins within federal reservations, including Indian Reservations. It has been the Water Court practice to refrain from entering TPD's to cover basins within Indian reservations. For this reason, the bill would compound the problem of improper bifurcation of the Montana adjudication.

Our concern with the piecemealing of Montana's adjudication is based on more than technical considerations emanating from the McCarran Amendment. There is a real chance of unfairness to the United States and Indian Tribes if the adjudication proceeds along two paths. Water claimants whose rights are embodied in TPD's will come to regard those rights as fixed. This is especially troublesome because in our experience many of the rights included in TPD's are greatly exaggerated or

otherwise inaccurate. In the meantime, the determination of federal and Indian reserved rights is making little or no progress. By the time the Water Court turns to adjudicating the reserved rights (assuming they have not been compacted), the United States and the Tribes will be faced with a wall of opposition from claimants whose claims were included in TPD's, and who may have been relying on the TPD's for years. This result can and should be avoided by avoiding a piecemeal determination of water rights.

B. Federal Law Prohibits Requiring the United States to Pay for Costs. -- Finally, the proposed § 85-2-232(3), insofar as it is applied to the United States, violates federal law. The provision states that any person may obtain a copy of the temporary preliminary or preliminary decree upon payment of a fee.

The McCarran statute directs that "no judgment for costs shall be entered against the United States" in any suit under the Act. 43 U.S.C. § 666(a). For this reason, the federal government may not be required to pay a fee to obtain a copy of a decree in proceedings under the McCarran Amendment.

The required fee constitutes a cost under § 666(a). Although the statute does not define the term "costs," 28 U.S.C. § 1920 defines costs taxable in "any Court of the United States," and is thus an indication of the kinds of costs Congress contemplated when it prohibited exaction of costs against the United States in McCarran Amendment proceedings. Section 1920 lists "[f]ees and disbursements for printing and witnesses" (§ 1920(3)), and "[f]ees for exemplification and copies of papers necessarily obtained for use in the case" (§ 1920(4)) as costs. The fee required by the bill is apparently intended to cover the cost of printing the decree,[2/] and is thus the kind of litigation cost contemplated by 28 U.S.C. § 1920 (3) and (4). Thus, the fee required by the bill is a cost under 43 U.S.C. § 666(a), which may not be charged against the United States.

II. The Right to Object at Both the TPD and Preliminary Decree Stages Should Be Preserved. -- The comments under this head are directed to the draft bill entitled "An Act Stating that the Water Courts Shall By Order Reopen and Review All Temporary Preliminary Decrees, Preliminary Decrees, and Final Decrees," etc. This bill would permit the reopening of previously entered decrees and allow persons to object to water rights included in those decrees. The draft also specifies that no objection seeking to relitigate "any matter previously litigated and resolved as the result of any previous objection

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2/ This is because the amount of the fee is set at "$20 or the cost of printing, whichever is greater ***."

process" is permitted, unless the objection comes from an Indian Tribe or federal agency "that had commenced negotiations" with the Compact Commission at the time when the matter was litigated, "in which case the tribe or agency is entitled to the benefits of the suspension provided under 85-2-217." See proposed § 1(2) and proposed § 85-2-233(1).

We object to the above-described language in the draft to the extent that it limits the right of any party, including the United States, to object to the same water right claim at both the temporary preliminary and preliminary decree stages. Under the Montana Water Use Act in its current form, there is a right to object at the preliminary decree stage. M.C.A. § 85-2-233. The statute does not restrict the right to object to the preliminary decree as a result of a previous objection to a TPD.

It would be unfair to the United States and other parties to the adjudication to limit the right to object to the preliminary decree. Persons may have failed to object at the TPD stage, justifiably relying on their statutory right to challenge claims at the preliminary decree level. As we read it, the draft bill could retroactively block such persons from objecting to claims in the preliminary decree, contrary to their reasonable expectations. See § 4 of proposed bill, providing for retroactive application.

The draft bill does have the salutary effect of subjecting previously entered TPD's and preliminary decrees to renewed scrutiny before they are transformed into final decrees. However, we submit that this is not an effective means of remedying the problem of inaccurate decrees.

In December of 1987, the United States filed a motion in the Water Court to address the problem of inflated and inaccurate claims embodied in temporary preliminary and preliminary decrees. (See attached copy of motion and supporting brief.) Our motion requested (1) an order directing DNRC to issue reports regarding the need for reexamination of claims (using the improved Claims Examination Rules) in those basins under TPD's or preliminary decrees, and (2) reexamination of claims in five specific basins not yet under decree. By order filed on May 10, 1988, the Water Court denied the second request and took under advisement the first.

We maintain that the surest manner in which to address the problem of inaccurate decrees is to grant the relief requested in our motion. To reopen old decrees for new objections puts the burden on the United States and other parties to investigate their neighbors' water claims, a role which, in general, the parties are not capable of performing adequately. As we noted in support of our motion, that critical role belongs primarily to DNRC. Only with thorough DNRC claims examination,

Ex. #8

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conducted under the new Claims Examination Rules, can the process result in reasonably fair and accurate decrees of existing rights.

III. Other Comments. The draft bills at several points refer to "federal agencies" as the entities which hold water rights and object to the claims of other parties. (See, e.g., draft bill on reopening decrees, § 1(2).) The language should be changed to reflect that the United States holds water rights and makes objections on behalf of federal agencies and Indian Tribes.

In conclusion, we appreciate this opportunity to comment on the proposed legislation. We are confident that we share the same final goal - a full and fair adjudication of all waters within Montana.

Sincerely,

Hank Meshorer
by DC

Hank Meshorer
Chief, Indian Resources Section
Land and Natural Resources Division

Attachment

cc: Chief Judge Lessley (w/o attachment)

EXHIBIT 9
DATE 3-20-89
HB 699

Gray HB699 -- Unofficial
March 16, 1989

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR A PATIENT ASSURED COMPENSATION FUND ABOVE LOW PRIMARY LIMITS OF INSURANCE, FOR THE PAYMENT OF MEDICAL LIABILITY CLAIMS AGAINST PHYSICIANS WHO DELIVER BABIES; PROVIDING FOR THE RETURN OF DOLLAR SAVINGS TO ~~ORIGINAL CAPITALIZERS AND TO~~ PATIENTS WHO ARE INJURED IN THE MEDICAL SYSTEM; PROVIDING FOR AN OBSTETRICAL ADVISORY COMMITTEE TO MAKE RECOMMENDATIONS REGARDING OBSTETRICAL CARE; ~~PROVIDING FOR OBJECTIVE GUIDELINES FOR NONECONOMIC DAMAGES PROPORTIONATE TO THE SEVERITY OF INJURY OR THE LIFE EXPECTANCY OF THE INJURED PARTY;~~ PROVIDING FOR VOLUNTARY ENTRY INTO BINDING ARBITRATION FOR OBSTETRICAL CLAIMS WITHOUT REGARD TO NEGLIGENCE OF THE PHYSICIAN; PROVIDING FOR ADMINISTRATION BY THE MONTANA MEDICAL LEGAL PANEL UNDER THE REIMBURSED SUPERVISION OF THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES; PROVIDING FOR CAPITALIZATION BY A ~~PREMIUM TAX ON CASUALTY CARRIERS~~ TEMPORARY LINE OF CREDIT FROM THE GENERAL FUND, WITH THE ADVANCED MONEY TO BE REPAID; AMENDING SECTIONS 27-6-105, 27-6-602, 33-10-102, AND 33-23-311, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

STATEMENT OF INTENT

A statement of intent is required for this bill because it delegates rulemaking authority to the department of health and environmental sciences. This bill is intended to expand the authority of the department and to authorize the writing and adopting of rules in accordance with the Montana Administrative Procedure Act to:

(1) qualify or disqualify physicians for participation in the patient assured compensation fund; and

(2) facilitate the collection of assessments and charges for hospitals and participating physicians under the Patient Assured Compensation Act. This bill is intended to reimburse the department for the cost of writing and adopting the rules.

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

NEW SECTION. Section 1. Short title. [Sections 1 through 26] may be cited as the "Patient Assured Compensation Act".

NEW SECTION. Section 2. Purpose and goals. (1) The purpose of this legislation is to ~~increase the availability of~~ lower insurance costs for doctors providing obstetrical care and to increase access to that care, especially in rural areas of Montana, and to maintain the availability and accessibility of obstetrical care in urban areas of Montana.

(2) The goals of this legislation are to:

(a) eliminate from the insurance system any excess insurance money that may be collected because of complex insurance and legal problems related to excess reserves, excess profits, and the use of shared insurance data from states other than Montana;

(b) require the pass through of savings to those who bear the cost for the Patient Assured Compensation Act, including the class of patients and claimants with injuries received in the medical system;

(c) provide ~~more full and fair~~ a no-fault system of compensation to claimants ~~than the current medical-insurance-legal system does in cases involving physicians who deliver babies~~;

(d) ~~provide in advance a reasonable calculation of the actual amounts to be paid in obstetrics-related claims so that the funds necessary to pay claims can be properly raised from those who pay for the claims to ensure that damages do not increase exponentially~~;

~~(e)~~ provide a funding mechanism that is broader than the available base of funds from obstetricians and family practitioners providing obstetric care by using sources that have an interest in the maintenance of core industries in

rural areas and that have benefited from previous civil justice reform legislation; and

(f) provide an immediate reduction in the total cost of coverage for medical liability insurance for physicians who deliver babies.

NEW SECTION. **Section 3. Legislative findings.** The legislature finds that:

(1) there has been an accelerating and substantial reduction in available obstetrical services in Montana, especially in the rural areas, and this process is likely to continue unless appropriate steps are taken;

(2) the reduction in obstetrical services constitutes a severe statewide public health and economic problem, especially in rural areas, that may well continue unless appropriate steps are taken; ~~of a large magnitude and a statewide economic problem of a severe nature;~~

~~(3) in addition to the direct loss of obstetrical services in rural areas of Montana, there have been and will likely continue to be:~~

~~(a) broader adverse economic impacts to the hospitals in those communities, including the closure of some hospitals with resulting adverse impacts on the communities involved, that flow from a loss of a broad range of basic medical services as physicians who deliver babies retire early or leave the community;~~

~~(b) limitations on the availability and access to obstetrical care in urban areas, especially among lower-income women, brought about by increased pressures on limited resources in urban areas from women in rural areas who wish to obtain replacement obstetrical services;~~

~~(4)~~ (3) the impacts referred to in ~~subsection (3)~~ subsections (1) and (2) are strongly associated with, among other things:

(a) substantial previous increases in the cost of medical

liability insurance, a high level of current costs of medical liability insurance, and anticipated increases in the future cost of medical liability insurance to the point where the income from the delivery of babies does not justify the current or future cost of medical liability coverage;

(b) substantial previous increases in the number of physicians involved in obstetrical medical liability claims ~~against physicians~~, with an increased likelihood that each physician will be periodically involved in a number of legal claims;

(c) inducements for early retirement, relocation to another area, or the elimination or limitation of obstetrical services by doctors who deliver babies;

~~(5)~~ (4) the medical-insurance-legal system, because of its unpredictability and high cost, often ~~deprives~~ can deprive the most seriously injured and the least seriously injured of even their out-of-pocket economic damages or provides compensation for intangible damages disproportionate to the severity of the injury or the life expectancy of the injured party.

NEW SECTION. **Section 4. Definitions.** As used in [sections 1 through 26], the following definitions apply:

(1) "Actuarially sound basis" means that the probability of insolvency of the primary pool of funds has been lowered to a level of risk that is prudent to accept, as determined by an actuary hired by the fund, who is a member of the American academy of actuaries or the casualty actuarial society.

(2) "Administrator" means the administrator of the primary and secondary pool of funds, who is the director of the Montana medical legal panel provided for in 27-6-201.

(3) "Board" means the Montana state board of medical examiners provided for in 2-15-1841.

~~(4) "Bodily impairment" means temporary or permanent impairment or loss of bodily functions or bodily parts. The term does not include other impairments, including but not~~

~~limited to mental or emotional processes or behavioral controls.~~

~~(5)~~ (4) "Claimant" means a person claiming damages for injury from medical malpractice or required benefits for compensable injuries under [sections 1 through 26].

~~(6)~~ (5) "Commissioner" means the commissioner of insurance provided for in 2-15-1903.

~~(7)~~ (6) "Compensable injury" means any physical harm, bodily impairment, disfigurement, or a delay in recovery, under [section 24] that:

(a) is associated with or connected to the birthing process or the rendering of obstetrical care by a physician qualified under the terms of [sections 1 through 26];

(b) is associated in whole or in part with medical intervention rather than with the condition for which the intervention occurred; and

(c) is not consistent with or reasonably expected as a consequence of medical intervention or is a result of medical intervention to which the patient did not consent.

~~(8)~~ (7) "Condition" means the general state of health of the patient prior to medical intervention.

~~(9)~~ (8) "Delay in recovery" means any undue additional time spent under care that is not substantially attributable to the condition for which medical intervention occurred and includes consideration of the general health of the patient.

~~(10)~~ (9) "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

~~(11)~~ (10) "Designated premium equivalent" means the dollar amount paid by a patient to a physician ~~or deducted from the charges of a physician~~ under [section 24].

~~(12) "Disfigurement" means scars or adverse changes in bodily appearance beyond those that are medically required.~~

~~(13) "Economic damages" means those compensatory damages~~

~~payable as a result of a medical malpractice claim against a physician or a physician and other parties, that are objectively determinable and verifiable compensatory damages, including but not limited to medical expenses and care, rehabilitation services, custodial care, loss of earnings and earning capacity, loss of income, funeral or burial expenses, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, loss of business or employment opportunities, and any other objectively determinable and verifiable pecuniary or monetary damages.~~

~~(14)~~ (11) "Hospital" means a hospital as defined in 50-5-101.

~~(15)~~ (12) "Malpractice claim" means a malpractice claim as defined in 27-6-103.

~~(16)~~ (13) "Medical intervention" means the rendering as well as the omission of any care, treatment, or services provided within the course of treatment administered by or under the control of a physician or hospital.

~~(17)~~ (14) "Montana medical legal panel" means the panel provided for in 27-6-104.

~~(18) "Noneconomic damages" means those damages payable as a result of a medical malpractice claim against a physician or a physician and other parties that are subjectively determined to be nonmonetary or nonpecuniary damages, including but not limited to pain, suffering, inconvenience, grief, physical impairment, disfigurement, mental suffering or anguish, emotional distress, loss of society and companionship, loss of consortium, fear of loss, fear of illness, fear of injury, injury to reputation, humiliation, and any other subjectively determined nonmonetary or nonpecuniary damages.~~

~~(19)~~ (15) "Obstetrical advisory council" means an advisory council created pursuant to 2-15-122 by the department and provided for in [section 20].

~~(20)~~(16) "Patient" means an individual who receives or should have received care from a physician and includes any person or entity having a ~~claim of any kind, whether derivative or otherwise, as a result of alleged medical malpractice on the part of a physician or having a compensable injury. Derivative claims include but are not limited to the claim of a parent or parents, guardian, trustee, child, relative, attorney, or any other representative of a patient, including claims for economic damages, noneconomic damages, attorney fees or expenses, and all similar claims~~ right of action under 27-1-501.

~~(21)~~ (17) "Patient assured compensation fund" or "fund" means the fund created under [section 5] and comprised of a primary pool of funds and a secondary pool of funds.

~~(22) "Physical harm" means a wound, infection, disease, or death.~~

~~(23)~~ (18) "Physician" means a physician as defined in 27-6-103.

~~(24)~~ (19) "Primary pool of funds" means that separate and segregated portion of the fund established for the payment of claims, expenses, and other allowed and required expenditures pursuant to [sections 1 through 26], except for money payable from the secondary pool of funds.

~~(25)~~ (20) "Representative" means the spouse, parent, guardian, trustee, attorney, or other legal agent of the patient.

~~(26)~~ (21) "Secondary pool of funds" means that separate and segregated portion of the fund established for the payment of compensation, expenses, and other allowed and required expenditures pursuant to [section 24].

~~(27)~~ (22) "Surplus" means the excess of total assets minus liabilities of the primary pool of funds as defined by standard accounting practices for insurance carriers.

NEW SECTION. **Section 5. ~~Purpose~~ Fund created** --

attachment to department -- deposit and investment. (1) There is a patient assured compensation fund. Money for the fund collected and received pursuant to [sections 1 through 26] is to be used exclusively for the purposes stated in [sections 1 through 26].

(2) The fund is attached to the department for administrative purposes only, pursuant to 2-15-121, except as otherwise provided in [sections 1 through 26]. The department may promulgate rules and regulations implementing [sections 1 through 26].

(3) The primary and secondary pool of funds and any income from those funds must be held in trust. The funds must be deposited in segregated accounts (one for the primary pool of funds and one for the secondary pool of funds), invested, and reinvested by the department as a fiduciary, pursuant to law. The fund may not become a part of or revert to the general fund of the state.

NEW SECTION. **Section 6. Reimbursement to ~~department~~ departments.** The department and the department of insurance must be reimbursed from the primary pool of funds for any expenses incurred in the administration of [sections 1 through 26].

NEW SECTION. **Section 7. Capitalization and maintenance of primary pool of funds and secondary pool of funds -- ~~surcharge~~.** (1) To capitalize the primary pool of funds and the secondary pool of funds, there is ~~levied and collected on all insurance carriers authorized to write and engaged in writing casualty insurance pursuant to 33-1-206 in this state during 1987 and engaged in writing casualty insurance as of December 31, 1988, a one-time refundable surcharge in the form of a 1.17% premium tax surcharge based on 1987 carrier annual reports made pursuant to 33-2-705.~~ a temporary line of credit that may be drawn by the administrator from the state general fund and deposited in the funds, in the amount of $6,500,000.

The administrator may draw upon the temporary line of credit as needed for the purpose of operating the funds and paying claims. The temporary line of credit is a loan, not an appropriation, and the administrator must begin to repay the withdrawn money, interest free, to the general fund once the financial affairs of the funds are stabilized and the administrator knows how much he will need to, and is able through other funding sources to, keep the funds actuarially sound. A total of $100,000 ~~of the surcharge forms~~ must be withdrawn under the temporary line of credit to form the capitalization of the secondary pool of funds and the balance of the ~~surcharge forms~~ line of credit may be used, in the amount considered necessary by the administrator, for the capitalization of the primary pool of funds. ~~If the surcharges provided for in this section are refunded, the refund must be made in the method and manner provided for in [section 10].~~

(2) Except as otherwise provided in this section, the ~~primary pool of funds is fully nonassessable~~ participating physicians are not subject to assessment. In order to maintain the primary pool of funds, the following annual surcharges must be levied against physicians qualified under [section 16]:

(a) (i) for coverage from the primary pool of funds from $100,000 per occurrence and $300,000 in the annual aggregate up to $1 million per occurrence and $3 million in the annual aggregate for all claims made during the policy period of the qualifying physician's primary policy of insurance required by [sections 1 through 26] and pursuant to that primary policy, as to physicians insured for purposes of at least some obstetrical privileges with an insurer authorized under [sections 1 through 26]~~:~~

~~(A) as a family practitioner, an annual surcharge of $6,313;~~

~~(B) as an obstetrician, an annual surcharge of $13,141~~ an

annual surcharge that will keep the primary pool of funds actuarially sound, using, for annual surcharge changes after the first surcharge is levied, the same limitations and requirements as rate changes by the primary carrier of the physician;

(ii) an annual surcharge, separately and additionally paid by any professional service corporation, partnership, or other business entity and its employees desiring to qualify as physicians under [sections 1 through 26] in the same manner as charges are levied by the carrier providing primary coverage, at a rate to be determined by the actuary hired by the administrator;

(b) for each physician subject to the terms of [sections 1 through 26] who, after January 1, 1990, has an adverse ruling as to any medical malpractice claim by the Montana medical legal panel or a judgment or settlement as to a claim in excess of $25,000 and less than $50,000, the one-time sum of $500 because of the claim. If the amount of the judgment or settlement as to the claim is $50,000 or more, the one-time sum of $1,000 because of the claim. Any insurer required to report to the board pursuant to 37-3-402 shall also provide the report to the administrator and shall include in the report the amount of each settlement or judgment for each physician for whom a report is made. The certificate of authority of the insurer must be suspended by the commissioner pursuant to 33-2-119 if the reports are not provided to the administrator as required by 37-3-402 or within a reasonable time thereafter.

(c) after January 1, 1990, $5 from each physician subject to the provisions of [sections 1 through 26] for each baby delivered by that physician and $5 from each hospital for each baby delivered at the hospital. As a basis for the surcharge, by January 31, 1991, and on January 31 each year thereafter, each physician and each hospital shall report to the

administrator the number of babies delivered by them during the preceding calendar year.

~~(3) Beginning with the first year of operation of [sections 1 through 26], the annual surcharges for physicians provided for in subsection (2)(a) are subject to annual adjustment by the administrator, based upon requirements for the actuarial soundness of the primary pool of funds, under the same limitations and with the same requirements as a rate change undertaken by the primary carrier of the physician.~~

~~(4)~~ (3) The first annual surcharge for physicians provided for in this section must be collected by the Montana medical legal panel pursuant to 27-6-206 or within 30 days of [the effective date of this act], whichever occurs later. Beginning in 1990 and in each year thereafter, all subsequent annual surcharges for physicians provided for in this section and beginning in 1991, all surcharges provided for physicians in subsection (2)(b) and for physicians and hospitals in subsection (2)(c) must be collected by the Montana medical legal panel pursuant to 27-6-206. All collections must be remitted to the department within 14 days of receipt.

~~(5) The (3)one-time refundable surcharges for casualty insurance carriers provided for in this section must be collected by the commissioner on March 1, 1989, pursuant to 33-2-705 without deferral or installment or within 30 days of [the effective date of this act], whichever occurs later. The surcharge must be remitted to the department by the commissioner within 14 days of receipt, and if the surcharge is not timely paid as provided in this section, the certificate of authority of the insurer must be suspended by the commissioner pursuant to 33-2-119 until the surcharge is paid.~~

~~(6)~~ (4) The secondary pool of funds must be maintained solely through the surcharges on physicians and hospitals pursuant to subsections (2)(b) and (2)(c), distribution from

excess surplus pursuant to [section 10], the collection of designated premium equivalents pursuant to [section 24], and the revenues from any other source dedicated to the purposes of the secondary pool of funds.

NEW SECTION. **Section 8. Actuarial soundness of primary pool of funds.** (1) The fund's primary pool of funds must be maintained on an actuarially sound basis and may not become operational until a statement is prepared by an actuary, hired by the administrator, who is a member of the American academy of actuaries or the casualty actuarial society certifying that the primary pool of funds is expected to be actuarially sound.

(2) If the primary pool of funds would at any time be rendered insolvent by payment of all fixed and known obligations that will become final within 2 years from that time, the amount of future noneconomic damages payable within that calendar year must be prorated among existing claimants at the time of the determination in a manner sufficient to eliminate or reduce the insolvent circumstance to the extent possible. Any amount due and unpaid at the end of the 2-year period must be paid in the following 1-year period, with interest at the judgment rate from the time of deferral until payment, and must be paid before the obligations for administration of the primary pool and for noneconomic damages that become final during that year may be paid. The administrator shall increase the annual surcharge for the primary pool in order to ensure that proration of noneconomic damages does not occurr for more than 3 years.

NEW SECTION. **Section 9. Staff.** The administrator, using money from the fund as considered necessary, appropriate, or desirable by the department, may purchase the services of persons, firms, and corporations to aid in protecting the fund against claims, fully administering [sections 1 through 26], determining the actuarial soundness of the primary pool of

funds, and determining the return of savings to persons and entities paying any portion of the original capitalization of the primary pool of funds~~, as well as for making recommendations to subsequent legislative sessions~~.

NEW SECTION. **Section 10. Return of savings.** (1) On July 1, 1993, and on July 1 of each year thereafter, if the primary pool of funds is actuarially sound, all surplus in the primary pool of funds in excess of $1 million over the sum of the amount necessary to make that fund actuarially sound ~~and the amount of the original annual surcharge set by [sections 1 through 26] times the number of qualified physicians~~ must be distributed equally among:

(a) ~~the casualty insurance carriers who have paid surcharges into the primary pool of funds, pro rata and proportionate to their original contributions~~ the general fund, as repayment of amounts withdrawn under the temporary line of credit, until such ~~contributions~~ amounts have been repaid; and

(b) the secondary pool of funds.

(2) The administrator, upon receipt of capital contributions pursuant to [sections 1 through 26], shall issue the person or entity paying the capital contribution a certificate representing the contribution and containing the terms of repayment, if any. The collection of capital contributions or the prospects of a return of savings may not be considered to be an unregistered investment contract or otherwise require registration as a security under the securities laws of Montana.

NEW SECTION. **Section 11. Reinsurance authority.** The fund ~~has the power to~~ shall negotiate for, contract for, and purchase reinsurance~~, subject to the control of the department~~.

NEW SECTION. **Section 12. Claims for payment.** Except as otherwise provided in [sections 8(2) and 24]~~+~~

~~(1)~~ , claims for payment from the primary or secondary pool of funds that become final ~~during the first 6 months of the calendar year must be computed on June 30 and must be paid no later than the following July 15; and~~

~~(2) claims for payment from the primary or secondary pool of funds that become final during the last 6 months of the calendar year must be computed on December 31 and must be paid no later than the following January 15~~ must be paid within 30 days.

NEW SECTION. **Section 13. Claims against fund -- procedure.** (1) The department shall issue a warrant in the amount of each claim, in the manner required for payment under [sections 1 through 26], submitted to it against the primary or secondary pool of funds on ~~June 30 and December 31 of each year~~ the first day of the following month.

(2) ~~The only claim against~~ A payment from the primary pool of funds ~~must~~ may be made only upon a voucher or other appropriate request by the administrator, submitted along with:

(a) a certified copy of a final judgment against the fund; or

(b) a duplicate original of a settlement entered into by the administrator on behalf of the primary pool of funds involving a physician qualified under the terms of [sections 1 through 26].

(3) ~~The only claim against~~ A payment from the secondary pool of funds ~~must~~ may be made only upon a voucher or other appropriate request by the administrator, submitted along with:

(a) a certified copy of a final judgment or award of entitlement to the benefits of [section 24]; or

(b) a ~~certified copy of a settlement for the benefits of [section 24] approved by the Montana medical legal panel~~ duplicate original of a settlement entered into by the

administrator on behalf of the secondary pool of funds.

NEW SECTION. **Section 14. Payment from primary pool of funds after exhaustion of insurance coverage -- excess claims -- procedure.** (1) If a physician qualified under [sections 1 through 26] or his insurer ~~as~~ under insurance required by [section 16] has agreed to settle liability on a claim by payment of its policy limits and the claimant is demanding an amount in excess of the policy limits or if the annual aggregate under the insurance for the physician has been paid by or on behalf of the physician, the claimant shall notify the administrator ~~in the manner provided in subsection (2) and receive a reply from the administrator as a condition precedent to recovery from the primary pool of funds~~.

(2) The claimant shall provide the administrator in writing~~, postage prepaid by certified mail,~~ a short and plain statement of the nature of the claim and the additional amount for which the claimant will settle. ~~The statement must include, separately stated, the amounts previously paid and the additional amounts demanded with respect to the damages as a whole without regard to any previous payment. The statement must also include:~~

~~(a) the amount of any past damages, itemized as to economic and noneconomic damages; and~~

~~(b) any future damages and the periods over which they will accrue, on an annual basis, for each of the following types:~~

~~(i) medical and other costs of health care;~~

~~(ii) other economic loss; and~~

~~(iii) noneconomic loss.~~

~~(3) The calculation of future damages under subsection (2) must be based on the costs and losses during the period of time the claimant will sustain those costs and losses unless a claim of wrongful death is involved. In wrongful death claims, future damages must be based on the losses during the period of time the injured party would have lived but for the injury~~

~~upon which the claim is based, and the claimed future damages must be expressed in current values without regard to future changes in the earning power or purchasing power of the dollar.~~

~~(4) If a claim of wrongful death is not involved, the statement under subsection (2) must state the claimed severity of the injury and whether the injury is limited to mental or emotional harm or involves physical harm. If the injury involves physical harm, the claimant shall state whether the physical harm includes bodily impairment or disfigurement.~~

~~(5) The statement under subsection (2) must also specify what percentage of the claimed damages are alleged to be the responsibility of each physician against whom a claim is made.~~

~~(6) If, within 30 days after receipt of the statement, the administrator has not accepted the offer of settlement in writing, the claimant may proceed with any claim against the physician. The patient assured compensation fund must be named as a necessary and proper party in any state or federal court proceeding for all causes of action arising after [the effective date of this act].~~

~~(7) (a) The statute of limitations with respect to any medical malpractice claim against a qualified physician under [sections 1 through 26] is tolled by the deposit in the United States mail of the writing required by this section and does not begin to run again until the greater of:~~

~~(i) 30 days after mailing; or~~

~~(ii) the running of the applicable limitation period under 27-6-702.~~

~~(b) The time period of tolling is not computed as part of the period within which the action may be brought.~~

~~NEW SECTION. Section 15. Discharge of obligation to pay amount from funds. The obligation to pay an amount from the primary or secondary pool of funds may be discharged, unless~~

~~otherwise required or permitted by law, through:~~

~~(1) payment in one lump sum for accrued damages;~~

~~(2) an agreement requiring periodic payments from the primary or secondary pool of funds over a period of years;~~

~~(3) the purchase of an annuity payable to the claimant, with the administrator having the power to contract with those insurers permitted under 25-9-403(4); or~~

~~(4) any combination of the payment plans in subsections (1) through (3).~~

[RENUMBER SUBSEQUENT SECTIONS]

NEW SECTION. **Section 16. Qualifications for physician.** (1) In order to become and remain qualified under the provisions of [sections 1 through 26], in addition to the procedures established by the department for regulation of application for qualification, a physician must:

(a) pay all surcharges required by [sections 1 through 26] in a timely manner;

(b) at the time of qualification, irrevocably agree in writing to be bound by the results of any arbitration provided for in [section 24];

(c) (i) if acting as an individual physician, be insured and continue to be insured by an authorized insurer under a valid and collectible policy of medical liability insurance in at least the amounts required by subsection (2), for purposes of at least some obstetrical privileges as an obstetrician or as a family practitioner; or

(ii) if a member of a professional service corporation, partnership, or other business entity desiring to qualify as a physician, ~~have one or more~~ be a member of one that has more than 50% of the members of the business entity insured as an obstetrician or as a family practitioner with some obstetrical privileges;

(d) establish proof of qualifying coverage for lower limits

and proof of specialty.

(2) Proof under subsection (1) may be established by the physician's insurance carrier annually filing with the administrator proof that the physician is insured by a policy of malpractice liability insurance in the amount of at least $100,000 per occurrence and $300,000 in the annual aggregate for all claims made during the policy period, along with the specialty under which such policy was issued. ~~Any insurer offering such a policy may offer a policy with deductible options of up to one-half of the limits.~~ The administrator may require a professional corporation seeking to qualify to provide information necessary to determine if the corporation is eligible as a physician.

NEW SECTION. **Section 17. Failure of physician to qualify for change of coverage -- limits of liability of fund -- rights and duties of physician.** (1) A physician who fails to qualify under [sections 1 through 26] or who becomes disqualified is not covered by the provisions of [sections 1 through 26] after the date of disqualification and is subject to liability under the law without regard to the provisions of [sections 1 through 26], except for claims made while the physician was qualified. If a physician does not qualify, the claimant's remedy will not be affected by the terms and provisions of [sections 1 through 26]. The primary pool of funds is not liable for any amounts up to the limits of qualifying coverage of a physician established in [section 16]. The secondary pool of funds is liable only up to the amounts contained in that fund in the manner provided in [section 24].

(2) Within 14 business days of receipt of the information required for qualification of a physician, the administrator shall notify the physician whether the physician is qualified, and if so, the date he became qualified.

(3) The primary pool of funds is not liable for any amounts

until the limits of the qualifying coverage for lower limits of the physician have been paid or are payable and then only above those limits of coverage. The maximum liability of the primary pool of funds is $1 million per occurrence and $3 million in the annual aggregate as to each qualified physician for all claims made during the policy period of the coverage for lower limits. The claimant's remedy for amounts over the limits of the primary pool of funds are not affected by the terms and provisions of [sections 1 through 26], except as otherwise provided.

(4) Except as otherwise provided in [sections 1 through 26], the rights and duties of a physician qualifying under [sections 1 through 26], including but not limited to the nature, extent, and limits of coverage of the primary pool of funds, are the same as the rights and duties of that physician under his qualifying coverage for lower limits, including but not limited to all exceptions, exclusions, and endorsements to the lower limits of coverage.

(5) Failure to maintain levels of coverage required under this section or nonrenewal, cancellation, or the elimination of obstetrical coverage for lower limits of coverage ~~constitute~~ constitutes disqualification of the physician under the terms of [sections 1 through 26] when the changes become effective with respect to the lower limits of coverage, if at all. The carrier providing lower limits of coverage shall promptly notify the administrator of changes in coverage pertinent to this section in the same manner as required of notice to insureds.

~~(6) Notwithstanding any other provision of [sections 1 through 26], if the administrator determines that, due to the number and dollar exposure of claims filed against a physician qualified under [sections 1 through 26], the physician presents a material risk of significant future liability to the fund, the administrator is authorized, after notice and an~~

~~opportunity for hearing, to terminate the liability of the fund for all claims against the physician.~~

~~(7)~~ (6) Except as otherwise provided in [sections 1 through 26], Title 33 has no application to [sections 1 through 26]. The following provisions of Title 33 apply to [sections 1 through 26]: 33-15-411; 33-15-504; 33-15-1101 through 33-15-1121; Title 33, chapter 18; Title 33, chapter 19; 33-23-301; and 33-23-302.

NEW SECTION. **Section 18. Adequate defense of fund -- notification as to reserves.** The administrator may provide for the defense of the primary and secondary pool of funds against a claimant's claim ~~and may appeal a judgment which affects the funds~~. The physician or his insurer for qualifying coverage for lower limits shall provide an adequate defense to the claim and is in a fiduciary relationship with the primary or secondary pool of funds with respect to any claim. Any carrier representing a physician subject to [sections 1 through 26] shall immediately notify the administrator of any case upon which it has placed a reserve of $50,000 or more.

NEW SECTION. **Section 19. Primary pool of funds not liable for punitive damages.** The primary pool of funds is not liable for punitive or exemplary damages of any kind. This section does not relieve the liability of a physician for punitive or exemplary damages.

NEW SECTION. **Section 20. Appointment and recommendations of obstetrical advisory council.** (1) The department shall appoint an obstetrical advisory council, subject to the approval of the governor, composed of seven people, ~~five~~ four of whom must be physicians qualified under [sections 1 through 26]. ~~The~~ Expenses for travel and lodging and the administration of the council must be funded from the primary pool of funds, and members must be appointed for 4-year terms. A vacancy must be filled for the unexpired portion of the term in the same manner as the original appointment.

(2) The council shall make recommendations regarding:

(a) prenatal and postnatal care, including but not limited to better access to comprehensive obstetrical services, improved professional competency, and peer review and quality assurance in connection with prenatal care, labor, delivery, immediate care of the newborn, and care of the postpartum woman;

(b) risk prevention and other quality of care;

(c) designated compensable events, for which compensation should in all instances be paid, to be included in [section 24];

(d) economic and noneconomic damage schedules which should be included in [sections 1 through 26]; and

(e) the proper implementation or correction of [sections 1 through 26] as the council considers appropriate, pursuant to guidelines provided by the administrator.

NEW SECTION. **Section 21. Disciplinary action against physicians.** After [the effective date of this act], upon the receipt by the board of information from the reports required by 33-23-311(3), 37-3-402, this section, or any other source that a physician has had three or more medical malpractice claims where a Montana medical legal panel result was adverse or indemnity has been paid or is payable in excess of the amount of $10,000 for each claim within the previous 5-year period, the board shall investigate the occurrences upon which the claims were based. The board shall determine if action by the board against the physician is warranted under 37-3-323 through 37-3-328 and may take action under those sections. In 1995 and annually thereafter, the board shall publish a summary of action taken or not taken on claims pursuant to this section. The summary may not identify individual physicians. The summary is in addition to any other requirements of the law and may not limit the obligations otherwise required by law.

~~NEW SECTION. Section 22. Predictability of damages. In a trial in district court of any medical malpractice action for damages for injury not including wrongful death where the patient assured compensation fund is a party to the action, the court shall:~~

~~(1) upon proper motion of any party subsequent to verdict and before entry of judgment, review an award against any party for noneconomic damages to determine whether the award is clearly excessive or inadequate. If the award is not in substantial accord with a proper award of damages after considering the factors in subsection (2), the court shall, acting with caution and discretion, modify the award in a manner reasonably consistent with that subsection, unless there is clear and convincing evidence that the interest of justice would not be served by the modification. The court shall give written reasons for a modification or refusal to modify. If the party adversely affected by any modification objects, the court shall order a new trial on the issue of noneconomic damages only. Economic damages awarded and the fact of liability are admissible at the new trial, but factual matters pertaining to liability are not admissible.~~

~~(2) in determining whether an award requires modification under subsection (1), consider:~~

~~(a) whether the amount awarded indicates prejudice, passion, or corruption on the part of the trier of fact;~~

~~(b) whether it clearly appears that the trier of fact ignored the evidence in reaching a verdict or misconceived the merits of the case as to damages recoverable;~~

~~(c) whether the trier of fact took improper elements of damages into account or arrived at the amount of damages by speculation and conjecture;~~

~~(d) whether the award is reasonably related to the damages proved and the injury suffered pursuant to the guidelines in subsection (3); and~~

~~(c) whether the award is supported by the evidence and could be adduced in a logical manner by reasonable persons.~~

~~(3) use the guidelines in this subsection in determining whether to modify an award when considering subsection (2)(d). Noneconomic damages are not proportional to the injury received if they exceed the greater of:~~

~~(a) weekly wage compensation benefits as computed pursuant to 39-71-701 times the life expectancy in weeks; or~~

~~(b) the multiple of economic damages awarded by the jury, pursuant to the severity of the injury as determined by the finder of fact as properly shown by the evidence for purposes of calculation, as follows:~~

~~(i) for mental or emotional harm only: 0.5 times the amount of economic damages or $1 million, whichever is greater;~~

~~(ii) for physical harm without bodily impairment or disfigurement: an amount equal to the amount of economic damages or $2 million, whichever is greater;~~

~~(iii) for bodily impairment or disfigurement: 1.5 times the amount of economic damages or $3 million, whichever is greater.~~

[RENUMBER SUBSEQUENT SECTIONS]

NEW SECTION. **Section 23. Contractual right to extended reporting endorsements -- prior acts coverage.** (1) Each physician qualified under [sections 1 through 26] has the contractual right, on the same terms and conditions as that physician has under the qualifying lower limits of coverage, if any, to obtain an extended reporting endorsement for coverage by the primary pool of funds for claims for medical malpractice that occur during the time a physician was qualified under [sections 1 through 26] but that are reported after the physician ceases to be qualified.

(2) The cost of the purchase of an extended reporting endorsement paid by the physician to the fund is equal to a

multiple of the current annual surcharge under [section 7]. The multiple is the lesser of the multiple being charged under the qualifying lower limits of coverage at that time or the multiple determined by the fund's actuary.

(3) Prior acts and omissions coverage, provided to the qualified physician upon qualification for coverage by the primary pool of funds for claims that have occurred but have not been made, must be provided only as to claims that are also covered under the terms of a valid and collectible primary policy of insurance coverage carried by the physician, qualified as required by [sections 1 through 26] and any endorsements to the policy. Prior acts and omissions coverage from the fund is subject to the following exclusions and limitations in addition to those contained in [sections 1 through 26]:

(a) The fund may not provide coverage for any liability to any qualified physician with respect to:

(i) any claim made against a physician qualified under [sections 1 through 26] at any time prior to the date of qualification, regardless of whether or not the claim has been reported to any liability insurer; or

(ii) any potential claim against any qualified physician of which any physician is aware or reasonably should have been aware as of the date of qualification, regardless of whether or not the claim has yet been made or reported to any liability insurer. For purposes of this subsection, a potential claim includes but is not limited to instances where any insured has received an oral or written communication from a legal representative of a patient or a request by or on behalf of a patient for copies of medical records under circumstances reasonably indicative of a potential claim.

(b) The limits of liability of the fund for prior acts claims is the lesser of the limits of liability of the primary pool of funds under [sections 1 through 26] or the limits of

liability of any valid and collectible liability insurance carried by the qualified physician prior to qualification.

NEW SECTION. **Section 24. Compensation for injuries from medical intervention without regard to fault.** (1) The purpose of this section is to establish a system of prompt, efficient, and equitable compensation for certain economic damages and attorney fees to those claimants injured through medical intervention in the birthing process or obstetrical care, without regard to negligence of the physician. ~~This section applies only if the patient opts on a voluntary basis to pay a designated premium equivalent and later signs an arbitration agreement to arbitrate the claim before the Montana medical legal panel.~~

(2) ~~Each physician shall disclose to each patient, at~~ At the time of any initial medical treatment by a participating physician related to the birthing process or obstetrical care, ~~the amount of funds on hand in the secondary pool of funds and the designated premium equivalent that will be contained in the fees to be charged by giving the form provided by the administrator to the patient~~ the patient is eligible to participate in the secondary pool and becomes liable for the payment of a designated premium equivalent. The initial amount of the designated premium equivalent is $25~~. The amount~~ , is nonrefundable, and is subject to change by the department, by rule, after consideration of the recommendations of the obstetrical advisory council. ~~The administrator shall regularly keep the physicians advised of the amount of money in the secondary pool of funds.~~

(3) Each patient, at the time ~~the patient is provided the form required in subsection (2), must be given an opportunity not to participate in the secondary pool of funds and to have the designated premium equivalent deducted from the fees to be charged~~ of initial medical treatment related to the birthing process or obstetrical care, must be informed by the physician

of the provisions of subsection (2) and this subsection. The physician shall at that time give the patient a pamphlet that clearly and adequately describes the provisions of [sections 1 through 23] and advises the patient to contact an attorney if the patient believes the patient has a malpractice claim related to the birthing process or obstetrical care. The pamphlet must be written by the state bar of Montana, and the primary pool shall pay the cost of publishing and distributing the pamphlet. The physician shall add the designated premium equivalent to the first bill sent to the patient and inform the patient at the time of the initial medical treatment that the amount will be added to the bill. If the patient cannot afford the premium ~~and wishes to participate in the secondary pool of funds,~~ the patient shall deliver a signed letter to the physician to that effect and the premium must be waived. The designated premium equivalent must also be waived if prohibited by federal law.

(4) ~~If the patient wishes to participate in the secondary pool of funds:~~

(a) ~~prior to any claim of injury and prior to any known complications of delivery or pregnancy, the~~ The physician shall ~~immediately~~ , within 30 days of the time of initial medical treatment, remit to the department the amount of any required designated premium equivalent or the letter from the patient stating an inability to pay the premium. ~~Failure of the patient to pay or provide the letter disqualifies the patient from any participation in the secondary pool of funds.~~

(b) ~~subsequent~~ Subsequent to any claim of injury and subsequent to any known complications of delivery or pregnancy, the patient ~~shall~~ may provide the physician with an agreement to arbitrate a claim arising out of the birthing process or obstetrical care, on a form provided by the administrator. The physician and the patient or the patient's

representative shall execute the agreement to arbitrate the claim. ~~Upon approval by the administrator, the agreement is binding upon the patient, the patient's representative, any claimant, and the physician for purposes of a claim for required benefits for compensable injuries under [sections 1 through 26]. An executed copy of the agreement to arbitrate must be provided to the administrator and is subject to his approval as to form and content before it may become effective.~~

(5) A claim for recovery of required benefits must be filed pursuant to the provisions of Title 27, chapter 6, naming the secondary pool of funds a party, with that chapter and its rules of procedure being applicable to the secondary pool of funds as if it were a health care provider. The claim is governed by Title 27, chapter 6, as if it were a malpractice claim. The arbitration panel must be composed of an attorney, a physician, and a professional arbitrator. The professional arbitrator must be knowledgable in workers' compensation law and is the chairman of the panel. The arbitration agreement of the parties constitutes a request for recommendation of an award, and the recommended award constitutes an approved settlement agreement pursuant to 27-6-606 and an award pursuant to Title 27, chapter 5.

(6) (a) Except as provided in subsection (6)(b), Title 27, chapter 5, applies to the claim and any award.

(b) The provisions of 27-5-211 through 27-5-218 do not apply to the claim, and any conflict between Title 27, chapter 5, and Title 27, chapter 6, must be resolved in favor of the latter.

(7) The filing of a claim for recovery before the Montana medical legal panel under the arbitration agreement~~, unless the arbitration agreement has been revoked in writing by the patient prior to filing of the claim,~~ constitutes:

(a) a valid and binding agreement that the sole matter in

controversy is whether there is a compensable injury and, if so, the amount of required benefits available as compensation;

(b) a waiver of trial by jury or the court; and

(c) the sole and exclusive remedy for:

(i) any malpractice claim against a physician qualified under [sections 1 through 26] ~~or a hospital~~; or

(ii) a claim for required benefits for a compensable injury by the patient~~, his heirs or representatives, or his parents or next-of-kin, or any other person whose claim is derivative from the incident~~.

(8) ~~The~~ If a claim has not been filed under subsection (7), the filing of a malpractice claim in federal court or pursuant to Title 27, chapter 6, against one or more physicians subject to [sections 1 through 26] constitutes a revocation in writing of the arbitration agreement provided for in this section ~~if the claim represents that the claimant has been fully advised in writing by legal counsel of the options available under [sections 1 through 26] and a true and correct copy of the writing is attached to the claim. If the claimant is not represented by counsel in a Montana medical legal panel proceeding, the administrator shall provide the advice in writing and the claimant shall make a written binding election to proceed with the malpractice claim or to amend the claim for recovery under an arbitration agreement obtained pursuant to subsection (6). The written advice and election must be filed with the Montana medical legal panel~~.

(9) Claims for required benefits for a compensable injury under a valid arbitration agreement are limited to required benefits and only required benefits may be paid for a compensable injury.

(10) (a) Required benefits under this section are ~~limited to the following items as computed under [sections 1 through 26]~~ reasonable attorney fees for panel proceedings, but not

exceeding $125 an hour, and one and one-half times:

(i) medical and hospital expenses and future medical and hospital expenses ~~as incurred,~~ computed ~~and paid~~ in the manner provided in 39-71-704 and the rules implementing that section;

(ii) lost earnings and future lost earnings ~~as incurred,~~ computed~~, and paid~~ in the manner provided in 39-71-701~~(1)~~ and ~~according to the definition of~~ , if the claimant was unemployed at the time of the injury, the average weekly wage as defined in 39-71-116 , at the time of the injury ~~and the rules implementing those sections; and~~

~~(iii) reasonable attorney fees for panel proceedings, computed and paid in the manner provided in 39-71-613, 39-71-614, and the rules implementing those sections~~.

(b) Required benefits do not include medical and hospital expenses for items or services or reimbursement the patient received ~~or is entitled to receive~~ under the laws of any state or the federal government, except to the extent exclusion of such benefits is prohibited by federal law, or expenses paid by any prepaid health plan, health maintenance organization, or private insuring entity or pursuant to the provisions of any health or sickness insurance policy or other private insurance program.

~~(c) Proceeds to beneficiaries, as defined in 39-71-116, must be determined pursuant to 39-71-723, and lump-sum payments for future benefits are prohibited.~~

(11) All awards must be paid from the secondary pool of funds on ~~an annual~~ a monthly basis for required benefits that have accrued and pursuant to Title 25, chapter 9, part 4, for future required benefits, and that part applies in all instances to claims for required benefits except as otherwise provided in this section and to the extent the secondary pool of funds has sufficient funds for payments without becoming actuarially unsound. If the secondary pool of funds has

insufficient funds with which to pay an award or awards, payments must be made in the same manner, pro rata as to all claims against the secondary pool of funds at the time of the required payment. The unpaid amounts of any award constitute a future obligation of the secondary pool of funds as funds become available. The future obligation is not enforceable by any process of law other than pursuant to the terms of this section.

(12) All costs of administration of the secondary pool of funds must be paid from the secondary pool of funds, and the costs of administration must be paid prior to the payment of any required benefits or required obligations of the secondary pool of funds provided elsewhere in [sections 1 through 26]. If the secondary pool of funds is insufficient to pay the costs of administration of the secondary pool or any attorney fees required to be paid by the secondary pool, the administrator is authorized to loan the secondary pool sufficient funds for the administration or fee from the primary pool of funds if the loan would not render the primary pool actuarially unsound. The loan is an advance against future distributions pursuant to [section 10] and in lieu of the distributions. The loan plus interest must be repaid to the primary pool of funds upon the future distribution otherwise accruing.

(13) The arbitration agreement form promulgated by the department must include on its face a written notice of the substance of subsections ~~(9) and~~ (7) through (10) in red, 10-point type.

(14) The period prescribed for the commencement of an action for relief under this section is ~~within 1 year of the date of injury~~ the period provided in 27-2-205.

NEW SECTION. **Section 25. Tax exemption.** The fund is exempt from payment of all fees and all taxes levied by this state or any of its subdivisions.

NEW SECTION. **Section 26. Review.** The administrator shall report in writing to each regular session of the legislature concerning the effectiveness of [sections 1 through 26] in achieving the stated goals and concerning other matters of importance. The status and operation of the fund must be included in that report.

Section 27. Section 27-6-105, MCA, is amended to read:

"27-6-105. What claims panel to review. The panel shall review all malpractice claims or potential claims against health care providers covered by this chapter, ~~except~~ including those claims subject to a valid arbitration agreement allowed by law ~~or upon which suit has been filed prior to April 19, 1977~~."

Section 28. Section 27-6-602, MCA, is amended to read:

"27-6-602. Questions panel must decide. (1) Upon consideration of all the relevant material, the panel shall decide whether there is:

~~(1)~~(a) substantial evidence that the acts complained of occurred and that they constitute malpractice; and

~~(2)~~(b) a reasonable medical probability that the patient was injured thereby.

(2) If ~~the panel decides that the acts complained of did not constitute medical malpractice and if~~ there is an arbitration agreement pursuant to [sections 1 through 26], the panel shall decide whether there is a compensable injury pursuant to [sections 1 through 26], and, if so, make an award pursuant to [section 24]."

~~**Section 29.** Section 33-10-102, MCA, is amended to read:~~

~~**"33-10-102. Definitions.** As used in this part, the following definitions apply:~~

~~(1) "Association" means the Montana insurance guaranty association created under 33-10-103.~~

~~(2) (a) "Covered claim" means an unpaid claim, including one for unearned premiums, or a contractual guaranty for an~~

~~extended reporting endorsement for claims reported after the expiration of the policy period which arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this part applies issued by an insurer, if such insurer becomes an insolvent insurer after July 1, 1971, and:~~

~~(i) the claimant or insured is a resident of this state at the time of the insured event; or~~

~~(ii) the property from which the claim arises is permanently located in this state.~~

~~(b) "Covered claim" shall~~ does not include any amount due a reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.

~~(3) "Insolvent insurer" means an insurer:~~

~~(a) authorized to transact insurance in this state either at the time the policy was issued or when the insured event occurred; and~~

~~(b) determined to be insolvent by a court of competent jurisdiction.~~

~~(4) "Member insurer" means any person who:~~

~~(a) writes any kind of insurance to which this part applies under 33-10-101(3), including the exchange of reciprocal or interinsurance contracts; and~~

~~(b) is licensed to transact insurance in this state.~~

~~(5) "Net direct written premiums" means direct gross premiums written in this state on insurance policies to which this part applies, less return premiums thereon and dividends paid or credited to policyholders on such direct business. "Net direct written premiums" does not include premiums on contracts between insurers or reinsurers.~~

~~(6) "Person" means any individual, corporation, partnership, association, or voluntary organization."~~

[RENUMBER SUBSEQUENT SECTIONS]

Section 30. Section 33-23-311, MCA, is amended to read:

"33-23-311. Information required of professional liability insurers -- submission. (1) For purposes of this section, "profession" means the occupations engaged in by physicians, osteopaths, registered nurses, licensed practical nurses, dentists, optometrists, podiatrists, chiropractors, hospitals, attorneys, certified public accountants, public accountants, architects, veterinarians, pharmacists, and professional engineers.

(2) Each insurance company engaged in issuing professional liability insurance in the state of Montana shall include the following information, by profession, from its experience in the state of Montana, in its annual statement to the commissioner:

(a) the number of insureds as of December 31 of the calendar year next preceding;

(b) the amount of earned premiums paid by the insureds during the calendar year next preceding;

(c) the number of claims made against the insurer's insureds and the number of claims outstanding as of December 31 of the calendar year next preceding;

(d) the number of claims paid by the insurer during the calendar year next preceding and the total monetary amount thereof;

(e) the number of lawsuits filed against the insurer's insureds and the number of insureds included therein during the calendar year next preceding;

(f) the number of lawsuits previously filed against the insurer's insureds which were dismissed without settlement or trial and the number of insureds included therein during the calendar year next preceding;

(g) the number of lawsuits previously filed against the insurer's insureds which were settled without trial, the total monetary amount paid as settlements in such settled cases, and

the number of insureds included therein during the calendar year next preceding;

(h) the number of lawsuits against the insurer's insureds which went to trial during the calendar year next preceding and the number of such cases ending in the following:

(i) judgment or verdict for the plaintiff;

(ii) judgment or verdict for the defendant;

(iii) other;

(i) the total monetary amount paid out, in those lawsuits specified in subsection (h);

(j) the total number of the insurer's insureds included in those lawsuits specified in subsection (h);

(k) the number of new trials granted during the calendar year next preceding;

(l) the number of lawsuits pending on appeal as of December 31 of the next preceding calendar year; and

(m) such other information and statistics as the commissioner considers necessary.

(3) The commissioner shall, ~~within 60 days of request~~ by October 1 of each calendar year, submit in writing to the appropriate licensing authority, in summary report form, the data and information furnished him pursuant to this section relevant to the particular profession, ~~or~~ facility, or class of facilities and shall likewise make the summary available to the public at the expense of the requestor, which data and information must be retained for at least 10 years."

NEW SECTION. **Section 31. Extension of authority.** Any existing authority to make rules on the subject of the provisions of [this act] is extended to the provisions of [this act].

NEW SECTION. **Section 32. ~~Nonseverability -- dissolution~~ Dissolution of fund -- transfer to Montana insurance guaranty association.** ~~(1) (a) If any provision of this chapter, any provision of the sections listed in subsection (1)(b), or the~~

~~application of any one of those provisions to any person or circumstance is held invalid by a decision of the Montana supreme court or the United States supreme court, such invalidity shall render this entire chapter invalid except for this section, whether or not the other provisions or application of this chapter can be given effect without the invalid provision or application.~~

~~(b) The provisions of 25-9-401 through 25-9-405, 25-15-202, 27-1-702, 27-1-703, 27-2-205(2), 28-1-301 through 28-1-303, 28-11-311, and this chapter are not severable.~~

~~(2)~~ ~~(a)~~ (1) The assets and liabilities of the primary pool of funds must be transferred to the Montana insurance guaranty association created under 33-10-103 upon the occurrence of any of the following events:

~~(i)~~ (a) [this ~~chapter~~ act] being rendered invalid because of one or more of the reasons set forth in subsection (1);

~~(ii)~~ (b) the primary pool of funds not being maintained on an actuarially sound basis for more than 3 years from the time such soundness is required by [this act] and the probability that the primary pool of funds will be exhausted by the payment of all fixed and known obligations that will become final within 3 years.

~~(b)~~ (2) The liabilities of the fund, including coverage endorsements, constitute covered claims as defined in 33-10-102, and the limit of liability of the Montana insurance guaranty association and any physician against whom a claim has occurred or a judgment has been rendered or with whom a settlement agreement has been entered into is equal to the limits of liability of the Montana insurance guaranty association under 33-10-105.

NEW SECTION. **Section 33. Applicability.** [This act] applies to all causes of action that constitute medical malpractice claims of any nature, whether obstetrical or otherwise, where the cause of action includes one or more

physicians who are qualified pursuant to the terms of [this act] and a claim for coverage exists against the patient assured compensation fund. ~~Provided, however, that [section 22] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act] and that section applies, if at all, only to causes of action that accrue on or after the date of qualification of a physician under [this act] against whom such a cause of action accrues.~~

NEW SECTION. **Section 34. Effective date.** [This act] is effective on passage and approval.

-END-

EXHIBIT 10
DATE 3-20-89
HB 699

ESTIMATED NOSE COVERAGE FOR PACF- PRESENT RATES

MATURE RATE -- 1M/3M

INCLUDES PHYSICIANS WHO ARE ASSOCIATED WITH OB'S AND FAMILY PRACTICE OB'S: 202

THE DOCTORS' COMPANY	PHYSICIAN COUNT	TOTAL COUNT	APPROXIMATE COST	TOTAL COST
OBSTETRICS-GYNECOLOGY	36		$ 3,084,984	
FAMILY PRACTICE/OBSTETRICS	27		1,237,545	
EMERGENCY MEDICINE	3		98,950	
FAMILY PRACTICE?ASST/SURG.	6		98,928	
FAMILY PRACTICE/MAJOR SURG.	2		65,966	
INTERNAL MEDICINE	6		79,186	
GENERAL SURGERY	@		82,094	
PEDIATRICS	1		16,488	
GYNECOLOGY	1		41,047	
GASTROENTEROLOGY	1		13,108	
CERTIFIED NURSE MIDWIFE	2		84,341	
CERTIFIED NURSE PRACTICIONER	1		7,351	
	88	88	$ 4,910,078	$ 4,910,078
UTAH MEDICAL INSURANCE				
OBSTETRICS-GYNECOLOGY	5		379,190	
FAMILY PRACTICE/OBSTETRICS	27		980,991	
* ASSOCIATES ESTIMATED/UMIA	10		140,000	
	42	130	$ 1,500,181	$ 6,410,259
INSUR. CORP. OF AMERICA				
OBSTETRICS-GYNECOLOGY	5		200,374	
FAMILY PRACTICE/OBSTETRICS	13		372,125	
* ASSOCIATES ESTIMATED/ICA	12		133,000	
	30	160	$ 705,499	$ 7,115,758
ST. PAUL FIRE & MARINE				
FAMILY PRACTICE/OBSTETRICS	28		$ 672,000	
* ASSOCIATES ESTIMATED/SPFM	14		140,000	
	42		$ 812,000	
		TOTAL = 202		$ 7,927,958

THIS ESTIMATE DOES NOT INCLUDE MMA'S 14% INFLATIONARY ANNUAL INCREASE.

IF THE FUND GOES BELLY UP AND THE PHYSICIANS HAVE TO BUY TAIL TO CONTINUE CARRIER COVERAGE, THE DOCTORS' COMPANY IS 1.8%, UMIA SAYS THEY INDIVIDUALLY FIGURE THE COST, ST. PAUL AND ICA ARE APPROXIMATELY 3.00%

EXAMPLE: THE DOCTORS' COMPANY TAIL COST WOULD BE: $ 8,838,140.

EXHIBIT 11
DATE 3-20-89
HB 699

Substitute Language For Section 7(1) Of HB 699

"NEW SECTION. Section 7. Capitalization and maintenance of primary pool of funds and secondary pool of funds. (1) To capitalize the primary pool of funds and the secondary pool of funds, there is a loan of $ 6,300,000 from the state general fund to the primary pool of funds and a loan of $ 100,000 from the state general fund to the secondary pool of funds, which loans are not an appropriation and are repayable pursuant to [section 10]."

A. WITHOUT INTEREST

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. SENATE BILL 166 DATE MARCH 20, 1989

SPONSOR SEN. BENGTSON

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Alan McKelsen	FSBC		
Richard Aldrich	Dept of Fish		—
Ed Steinmetz	MT Water Court		
Jo Brunner	MWRA	—	
Carol Mosher	Mt Stockgrowers		
Marvin Barber	A.P.A.	—	

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

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. SENATE BILL 167 DATE MARCH 20, 1989

SPONSOR SEN. BENGTSON

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Ricks Aldrich	Beat Eat		✓
Ed Steinmetz	MT Water Cont		
Jo Brunner	Mars	—	
Carol Mosher	Mt. Stockgrowers		
Marvin Barbee	F.B.A.	—	

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Richard Aldrich	Dept of Ent		✓
Ed Steinmetz	MT Water Coun		
J. Bruggen	Mang	✓	
Carol Mosher	Mt. Stockgrowers		
Marvin Baker	F. P. A.	✓	

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Ed Heinz	MT Water Coal		
Jo Brunner	MWRA	✓	
Carol Mosher	Mt. Stockgrowers		
Marvin Barber	A P P	✓	

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