MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on January 31, 1991, at 10:00 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: Robert Brown (R)

Staff Present: Valencia Lane (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion:

HEARING ON SENATE BILL 138

Presentation and Opening Statement by Sponsor:

Senator Lawrence Stimatz, District 35, said SB 138 would adopt the private workforce drug testing act. He stated SB 138 is not a confrontational bill, pitting employers against employees, or employers versus unions. Senator Stimatz told the Committee he is "not a johnny-come-lately" to the drug problem. He explained that he acted as deputy county attorney in Silverbow County, and as county attorney in the early 1970s. He advised the Committee he was also an assistant U.S. Attorney from 1961 to 1965.

Senator Stimatz stated he served on the first "informal" drug commission in Silverbow County. He explained that Sheriff Bob Petrovich was then a drug counselor, and said the problem began to hit in the early 1970s.

Senator Stimatz commented that SB 138 was presented by a coalition of Montana employers. He told the Committee there is presently no drug testing act in Montana, but federal law pertains only to business involved in transportation, safety, or fiduciary responsibility.

Senator Stimatz said SB 138 is a relatively short bill, and that the last two of the ten pages, amend the current act. He stated that over the past four or five years drugs in the workforce have cost employers about $100 billion annually. Senator Stimatz explained that NIDA (National Institute on Drug Abuse) has been the leading agency along with William Bennetts, National Office on Drug Control Policy.

Senator Stimatz stated that employers got together and developed statistics on drugs in the workplace. He said, "70 percent of drug addicts are full time employees, and two-thirds of the drugs being used are used in the U.S." Senator Stimatz advised the Committee that employers believe in reducing the demand for drugs so there will be no need for a supply.

Senator Stimatz commented that the bill is not compulsory or mandatory. He said definitions are contained in pages 1 and 2, and that section 3 may cause some controversy. Senator Stimatz said he would be willing to change language as long as the main purpose of the bill is not changed. He added that he would be okay with deleting language on page 6, lines 8-15.

Senator Stimatz left a copy of the Gallup Organization's July 1990 report entitled, "Institute for a Drug-Free Workplace - Montana" (Exhibit #1).

Proponents' Testimony:

Special Agent, Tom Pool, Demand Reduction Coordinator, Drug Enforcement Agency (DEA), Seattle, told the Committee he manages five northwestern states. He said, that as a drug prevention specialist, he has put on workshops for more than 1,000 employers in the northwest. Mr. Pool stated drug testing does work, but cannot give the same workshops in Montana because Montana law is restrictive. He commented he would provide expert information if necessary. (Exhibit #).

Gary Lamey, Drug Awareness Coordinator, Champion International, said he had been with Champion for 13 years, and Drug Awareness Coordinator for 10 months. He told the Committee he is also a member of union local 2581.

Mr. Lamey stated he was introduced to drugs in 1979 on the job, at the age of 19. He said that by age 27 his drug use had escalated to a full spectrum of drugs, and that he was also selling them. Mr. Lamey commented that he may have worked 20 full days sober during the last 3 years of his use. He advised the Committee

that users and sellers feel the job site is a safe place to use and to sell.

Mr. Lamey told the Committee the job site is the hardest place to stay sober. He cited the case of one employee with nine months of sobriety who was considering giving up his job in order to stay straight. He said that, as a union member, he believes union leadership is not voicing concerns with drugs.

Mr. Lamey commented that current law seems to protect the dealer and the user on the job. He said this bill, if enacted, can save people's lives.

David Michaelsen, Pathology Associates Medical Lab, Spokane, said he would address scientific issues of drug testing. He stated tests are only as good as can be supported in the courts, and that the courts are looking more at confidentiality and collection.

Mr. Michaelsen explained that the tests must meet several standards, and if not collected properly, a NIDA certified lab will not analyze them. He stated that samples are locked up in labs, and no names are used - only numbers. Mr. Michaelsen told the Committee there are about 60 NIDA certified labs in the U.S. He said these labs are given 3 rounds of 20 samples and if they ever come up with a false-positive test, those labs are rejected from certification.

Mr. Michaelsen stated that lab personnel meet special qualifications, and that the secured facility is limited to toxicology personnel. He said no results are reported over the phone, but are sent to a medical review officer (an M.D.), who either sends them to the employer by mail or secured fax. He told the Committee control and double-blind samples must meet requirements.

Ray Tillman, Vice President Human Resources, Montana Resources, Butte, said the company has 332 employees. He stated that the federal Mine Safety and Health Act states no drugs or alcohol are to be used at work. He said Montana Resources takes this commitment seriously.

Mr. Tillman told the Committee he had been employed in Montana for 22 years, and has worked with many employees with drug and alcohol abuse problems (Exhibit #3). He said the bill addresses employers who care about and have made an investment in their employees.

Dee Koher, IBM Marketing Representative, and former teacher, talked about the Employee Assistance Program from the employee standpoint. She stated that ten years ago she was "given a second chance" and was able to return to the workplace. Ms. Koher explained that she did not consider testing an invasion of privacy, but a measure of quality and excellence. She said the Employee Assistance Program is a vehicle for personal wellness.

Fred Dahlman, Sletten Construction Company, Great Falls, told the Committee that a drug testing program was implemented in June 1989, and in November 1990 on-site drug testing began in their Arizona business. He said testing included management and personnel, and that tests are run for accidents requiring medical care. Mr. Dahlman reported that of 89 tested, 14 were positive. He said 3 employees refused assistance and were terminated, but 11 accepted treatment and have been reinstated.

Mr. Dahlman explained that the tests are used to identify use and to offer assistance. He said posters to this effect are in place on work premises. He added that since testing began there has been only one on-the-job accident.

James Tutwiler, Montana Chamber of Commerce, said there is a consensus in the business community in Montana that business has a moral responsibility in controlling drugs. He stated he believes SB 138 is both an employer and employee bill.

Mr. Tutwiler advised the Committee that while stationed in Germany a real drug problem had to be faced and it was decided that the military could test for drugs. He explained that the tests were very scientific and backed-up, and it was found that not only non-commissioned troops, but mid-management people such as sergeants, technicians, and warrant officers, as well as some officers were using drugs.

Mr. Tutwiler stated there are still too many accidents in Montana and that drug users are more accident-prone. He said a poll of 500 working people in Montana showed 58 percent of them felt drug abuse at work posed a threat to safety. He told the Committee the poll was conducted by Montanans for a Drug-Free Workplace.

Curt Laingen, Montana Motor Carriers Association, read from prepared testimony in support of SB 138 (Exhibit #4).

Steve Granzow, representing Pegasus Gold Corp., stated his support of the bill.

Don Jenkins, Director of Governmental Relations, Golden Sunlight Mines, Inc., stated his support of the bill (Exhibit # 5).

Larry Silvey, Spring Creek Coal Co., stated his support of SB 138.

Steve Turkiewicz, Executive Vice President, Montana Auto Dealers Association, stated his support of the bill.

Laurie Shadoan, Bozeman Chamber of Commerce, stated her support of SB 138.

Kathy Anderson, Montana Wood Products Association, stated her support of SB 138.

Charles Brooks, Executive Director, Montana Retail Association, stated his support of the bill.

John Arstein, Conoco, Billings, stated his support of the bill.

Dick Nash, Washington Construction, Missoula, stated his support of SB 138.

Randle Romney, Boy Scouts of America, stated his support of SB 138 (Exhibit #6).

Rex Manuel, Cenex Petroleum, stated his support of the bill.

Ken Dunham, Montana Contractor's Association, stated his support of SB 138.

Opponents' Testimony:

Dan Edwards, International Oil, Coal, and Atomic Workers (OCAW), said he believes in the right of the worker to privacy, and that he does not believe employers should be the policemen of society (Exhibit #7).

Mr. Edwards said it is ironic that current law allows all of the things the proponents talked about (employee assistance programs, for example), except drug testing. He stated he believes we are dealing with hysteria, and said he supported the drug enforcement action of Champion. Mr. Edwards advised the Committee SB 138 "is a slick, high-sell job by IBM, Exxon and other corporations". He said he did support the bill with the adoption of full MRO (medical review officer) provisions.

Mr. Edwards advised the Committee that statistics from the Department of Transportation (DOT) were presented to the Montana Public Service Commission (PSC), showing fewer than .5 percent positive tests as of October 1989. He submitted there is no need for random drug testing.

Mr. Edwards stated Exxon uses a 20 nanogram testing level, and requires that any employee who has ever been in a substance abuse program must tell them. He read a judge's statement from McDonald v Hunter, DesMoines, Iowa, concerning search. Mr. Edwards said business and industry employees, unfortunately, don't have the same protection government employees have, and reminded the Committee there are ways to determine fitness for duty (Perform Factor Company, for example).

Don Judge, Montana AFL-CIO, encouraged the Committee to vote against SB 138 (Exhibit #8). He said the poll referred to by Jim Tutwiler was conducted in June 1990, and that it is known polls are

only as accurate as the originator wants them to be. He cited the cigarette tax polls and suggested that questions were asked in such a way as to obtain a desired response.

Mr. Judge told the Committee he was concerned with company intrusions into private life, and said if it happens this is no longer a free country. He said HB 138 is a bad bill.

Larry Middagh, a restaurant owner in Helena, employing 26 people, read from prepared testimony (Exhibit #9). He said he believes a positive employer/employee relationship is a key, and is built on trust. He said SB 138 will create an "us" versus "them" situation, and that the bill violates the presumption of "innocent until proven guilty". He asked if business owners would be tested, and said the bill seems to view the worker as a necessary evil. He told the Committee he believes the current drug testing bill is a good one.

Scott Chrichton, ACLU Montana, said he represented 800 families in the state. He stated that employer knowledge of an employee's personal life is changing in recent years, and that the ACLU opposes indiscriminate testing. He said he believes the procedure violates personal privacy (Exhibit #10).

Mr. Chrichton explained that an individual currently covered by federal law allowing random testing recently was the victim of a false-positive test. He said that individual was prepared to testify today, but received a phone call from the employer's attorney not to do so. Mr. Chrichton advised the Committee that individual's second test came back negative, but in another instance a Federal Express employee could not go to a ZZ Top concert because of ambient air levels.

Mr. Chrichton stated that Montana, Iowa, Vermont, and Rhode Island are the only states giving employees freedom from mandatory testing. He strongly encouraged the Committee to reject SB 138.

Jay ~~Verdon~~ Reardon United Steelworkers Local 72 of America, East Helena, said the bill tramples on employee rights. He read from prepared testimony in opposition to the bill (Exhibit #11), and said nothing in the bill addresses employee assistance programs.

Mr. ~~Verdon~~ Reardon explained that current coverage under the drug and alcohol abuse policy allows testing if the employer feels there is job impairment. He advised the Committee this policy has been in effect since May 1990, and no tests have been requested yet. He further stated that a union investigative committee did not find one accident to be attributed to drug or alcohol use on the job. Mr. Verdon said he believes employees could be singled out and harassed if they had a positive test. He added that he knows drugs and alcohol are a problem in the work force, and that there is a need to rehabilitate and to help these employees. He also said children should be educated concerning drugs and alcohol.

Randy Ostermiller, Exxon Refinery in Billings, and OCAW, read from prepared testimony (Exhibit #12). He said a number of stigmas are attached to one who has used or is alleged to use, and that one is presumed guilty until he or she proves otherwise. He told the Committee he has coached little league baseball in Billings for the past 20 years, and that if he were tested for drugs his relationship with the kids would be affected. He stated he does not use or condone the use of drugs, and tries to educate the players to this end.

Ben Coppel, Montana Nurses Association, stressed the need to develop employee assistance programs, and negotiating them into collective bargaining agreements. He said there is no provision in the bill for this, and read from prepared testimony (Exhibit #). Mr. Coppel stated he believes the bill will be used as a license to harass employees.

James T. Mular, Montana Joint Rail Labor Legislation Council, said this testimony is almost a repeat of 1989. He explained that the railroads go through random testing, and that he believes the bill gives companies a way to get rid of employees. He said if use is that bad, maybe the bill should be passed. He then urged the Committee to support SB 31, instead of SB 138.

Dean Schanz, OCAW Local 2-0740, said he represented 160 employees at the Exxon Refinery in Billings. He reported he has worked in the industry for 15 years, and has seen no problems during the past 7 years.

John Cochran, OCAW Local, Billings, stated there is a fair law on the books in Montana right now. He urged the Committee to vote no on SB 138.

Leonard Calvin, United Mine Workers of America, told the Committee he represented 200 workers in Montana, and urged them not to support SB 138.

Terry Minnow, Montanan Federation of Teachers and State Employees, asked the Committee to defeat SB 138.

Mark Langdorf, Field Representative, American Federation of State, County and Municipal Employees (AFSCME), said the Committee must consider what will happen with a false-positive test.

Julie Holzer, OCAW, representing 150 employees at the Cenex Refinery in Laurel, asked the Committee not to pass SB 138.

Bob Heiser, representing 3,000 members of the United Food and Commercial Workers Union, urged a do not pass recommendation.

Questions From Committee Members:

Chairman Pinsoneault asked if random testing were lawful in other states. Senator Stimatz replied he did not know. Tom Pool replied that about 40 states allow random testing.

Chairman Pinsoneault asked if there is a drug problem in rural areas. Mr. Pool replied there is, and pointed out the fact that there are approximately 30 treatment facilities listed in the Helena phone directory.

Chairman Pinsoneault asked Dee Koher, IBM, if that employee assistance program were available to all IBM employees. Ms. Koher replied it is.

Senator Rye asked Don Judge what there is to fear if the testee is clean. Don Judge replied that people don't want to work with people who have problems, and said he was concerned with the erosion of workers' rights.

Senator Rye asked if it would be okay if SB 31 passed. Don Judge replied that would help.

Senator Svrcek asked Gary Lamey if he could spot a substance abuser. Mr. Lamey replied he could not, but that he knew people in the workplace who use.

Senator Svrcek asked Mr. Lamey if it were part of his job to discover users to Champion. Mr. Lamey replied it was not; that his job is to help people with recovery. He added that those people must come for help.

Senator Svrcek asked Dee Koher, how people would be tested to find depression. Ms. Koher replied there is no way of testing, but employees can call the employee assistance phone number and receive assistance.

Senator Svrcek asked if all these problems affected peoples' ability to work. Ms. Koher replied they do.

Senator Svrcek asked how fitness for duty is determined, and if the employee assistance program were helpful. Ms. Koher replied the program is helpful.

Senator Svrcek asked Steve Browning if he would make the poll data available to the Committee that was referred to by Jim Tutwiler and Don Judge.

Senator Halligan stated that Montana has one of the best workforce's in the nation, and asked what the compelling interest would be. Senator Stimatz replied there is no invasion of privacy, and said "no one has a right to a job or to be fired".

Senator Halligan asked if employees had a role in developing the Arizona policy for Sletten Construction. Fred Dahlman replied they did not, that management made the decisions.

Senator Grosfield asked Dave Michaelsen if he were a toxicologist, and if roving labs were available. Mr. Michaelsen replied he was, and said collection of data is done for the lab under strict procedure.

Senator Grosfield asked about passive inhalation and the statement that NIDA will be lowering marijuana testing levels from 100 nanograms to 50 nanograms. Mr. Michaelsen replied that research of marijuana smoking in a 10 'x 10' room showed the highest level of passive inhalation at 76 nanograms. He said this is eliminated in 24 to 72 hours. He added that marijuana smoke in a car showed evidence of THC, and that it would probably also show up from attending a concert.

Senator Grosfield referred to page 6, line 22, and asked if the bill requested that tests be done by a qualified lab. He also asked if that language were impractical for the bill to work. Senator Stimatz stated line 16 requires strict collection procedure and is acceptable in court.

Senator Grosfield asked about language concerning the medical review officer on page 7, lines 7-10, and if an amendment would be objectionable. Mr. Michaelsen replied that the medical review officer currently reviews findings with the employee first.

Senator Yellowtail requested a copy of the poll referred to by Dan Edwards. Mr. Edwards replied he would get this information.

Senator Doherty asked why the bill gets rid of the prohibition against the use of lie detector tests. Steve Browning replied it was intended to go back to 1987 language.

Senator Doherty asked Mr. Browning if he believed all school children need to be tested. Steve Browning replied there are reasons for pubic health, and this bill shows a reason for testing of adults.

Senator Doherty asked Mr. Browning if he were looking to help employees with a mandatory employees assistance program to be used in conjunction with random testing. Mr. Browning replied he believes every employee should have a voice in the program.

Senator Towe said he did not hear one proponent address section 3 of the bill which immunizes an employer from liability. He asked if that were the key part of the bill. Steve Browning replied the bill repeals current law concerning crime as a condition for drug testing, and the immunity only applies with a qualified program and if it is not used to injure an employee. He added that the last section of the bill is the key part, and said

Montana is the only state in which a drug-free work force cannot be implemented.

Senator Towe stated, "So this hinges on written proceedings". Steve Browning replied, "this happens in all states in the nation".

Senator Towe asked if drugs for a heart condition would be excluded from the test. Steve Browning replied the employee could make that request with the medical review officer.

Senator Mazurek asked where the line needs to be drawn. He said drugs are a problem, shoplifting is a problem, and asked where it starts and where it stops - where the balance is. Steve Browning replied he believes testing should be done on every employee, from the boss on down. He said only hazardous occupations are interested in random testing.

Closing by Sponsor:

Senator Stimatz told the Committee the overriding philosophy of the bill is that employers gathered information from industrial sources which showed a drug problem in the work force. He stated employers want to identify drug users and treat them, as it costs more to hire new workers than to rehabilitate employees.

HEARING ON SENATE BILL 190

Presentation and Opening Statement by Sponsor:

Senator Cecil Weeding, District 14, said SB 190 is a revised method of enforcement concerning unfair trade practices. He stated section 1 contains new language and is a composite of laws from other states and section 2 contains a repealer. Senator Weeding explained that the bill broadens the process by which people can recover damages or express grievances. He proposed an amendment to the bill to reinsert the Attorney General (Exhibit #13).

Senator Weeding told the Committee the key words are "indirectly or directly affected", and that they allow pursuit of various remedies. He said he is basically representing agricultural groups, specifically beef and lamb. Senator Weeding advised the Committee that 15 states have similar legislation. He said the Department of Justice has declined to become too much involved and has encouraged the states to handle the situation. Senator Weeding stated remedy can go beyond Montana borders, and that there are people negotiating with packers.

Proponents' Testimony:

Jeanne Charter, Cutler Cow/Calf Producers and Northern Plains Resource Council, read from a prepared statement in support of SB 190.

Chase Hibbard, Helena area sheep and cattle grower, said the bill gives easy access to third parties and political subdivision to sue for price-fixing. He told the Committee he is a reluctant proponent, and that a National Cattlemen's Association study made two years ago found no evidence of collusion or price-fixing. He said they did find credibility and competition, and that there have been record-high prices for calves the past three years. Mr. Hibbard commented that it has been different for lambs, where prices have been record-lows. He explained that pelt prices are down 25 percent of the live price, and that there is a seasonal supply problem in the fall.

Mr. Hibbard said the national industry is working hard to solve the problem and to get quality yield and discount fact. He further stated they hope to have the situation resolved in six to nine months, and that this is more of a national issue. Mr. Hibbard added at there are racketeering laws. He questioned the effectiveness of trying to deal with the situation on a national basis, and said he was worried that the bill might make Montana more litigious as a state.

Bill MacKay, Jr. Roscoe, Montana, told the Committee he is a third-generation farmer representing himself. He said anti-trust laws were written because of the meat-packing industry, and that if free enterprise is going to work, buyers and sellers need to be willing to meet on a level playing field.

Beth Baker, Executive Assistant, Department of Justice, read from prepared testimony in support of SB 190 (Exhibit #/4).

Chet Luck, Montana Senior Citizens Association, stated his support of the bill.

Opponents' Testimony:

Ward Shanahan, Helena attorney representing Chevron Corporation, said it is the policy of Chevron to appear on anti-trust to clarify any problems with legislation. He stated it is possible that Senator Weeding's proposed amendment would address Chevron's concerns. Mr. Shanahan read from prepared testimony in opposition to the bill (Exhibit # /5).

James Tutwiler, Montana Chamber of Commerce, told the Committee that he was concerned that the bill is very vague and has the potential for a lively litigation environment. He said he agreed with concerns addressed by the previous opponent.

Questions From Committee Members:

Senator Towe asked Ward Shanahan to what extent he was addressing the bill. Mr. Shanahan replied he was concerned with threatened injury language and divestiture of a corporation's assets. He said that when this is coupled with "indirect" it creates a foundation for mischief.

Senator Towe stated language may need to be made clear that it applies only to injury. Mr. Shanahan replied it would apply to the whole body of federal anti-trust law. He said he realized that in Montana there is not departure from general rule.

Senator Towe said the bill does repeal the section concerning proving actual damages and noting which party can get into court. Mr. Shanahan replied the testimony shows departure from federal rule.

Senator Doherty asked Jim Tutwiler for evidence of his statements in opposition to the bill. Mr. Tutwiler replied he had none.

Senator Doherty asked who brings these suits. Chase Hibbard replied the business' harmed bring the suits.

Senator Doherty asked if the law is designed to protect, how it can hurt. He asked if the law would not actually be helping. There was no response.

Senator Yellowtail asked Chase Hibbard if he were representing Montana Stock and Wool Growers. Mr. Hibbard replied he was.

Closing by Sponsor:

Senator Weeding urged the Committee not to delete "indirectly", "or it will blow the whole thing". He stated he did not know how to address divestiture, but SB 190 ought to be a good business bill in Montana. He emphasized that people are not going to "run out and file suits", and said four or five other states are looking at this issue right now.

ADJOURNMENT

Adjournment At: 12:50 p.m.

Senator Dick Pinsoneault, Chairman

Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989 Date 3/Jan 9/

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen			
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe			

Each day attach to minutes.

Sen Stimatz Hearing SB 138 1-31-91 SB 138 Exhibit #1 pg. 1 of 38

Reports

The Gallup Organization, Inc.

PRINCETON, NEW JERSEY

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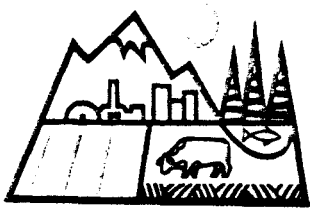
INSTITUTE FOR A DRUG-FREE WORKPLACE

Montana

July, 1990

Prepared by
Annette Smolik, Research Analyst
Scott S. Ahlstrand, Professional Analyst
Cal Martin, Senior Vice President
The Gallup Organization, Inc.
Princeton, New Jersey

Exhibit 2
1-31-91
SB 138



MONTANA CHAMBER OF COMMERCE
P. O. BOX 1730 • HELENA, MONTANA 59624 • PHONE 442-2405

TESTIMONY
OF THE
MONTANA CHAMBER OF COMMERCE
BY
JAMES TUTWILER, PUBLIC AFFAIRS MANAGER
SB 138
JANUARY 31, 1991

Mr. Chairman, members of the Committee, I am James Tutwiler representing the Montana Chamber of Commerce. The Chamber is also a member of the Montanans for a Drug Free Society.

We urge your support of SB 138 for the following reasons.

One - Montana is not immune to drug abuse. Its rural characteristics offer no protection. Responsible testing in the workplace, will help raise awareness of the problem Montanans face.

Two - National studies show that 70% of abusers work. The bill before you will help identify and expedite treatment of some of those who might never confront their abuse problem.

Three - Drug abusers in the workplace costs businesses millions annually i.e. absenteeism, accidents, lowered job efficiency and poses a threat to fellow workers. SB 138 will help reverse that trend.

Four - Montana businesses have a moral responsibility to contribute to the on-going national effort to eliminate drug abuse. However, current Montana law preludes most businesses from applying, an essential and proven procedure, testing, except in narrowly constrained circumstances. SB 138 will correct what is

Exhibit 2
1-31-91
SB 138

now a major obstacle to businesses in fulfilling their obligation.

Five - Drug testing in Montana now is feared and resisted over concerns for privacy, validity of test results and treatment of those found to be abusers. SB 138 spells out in detail explicit procedures that assure privacy, scientific correctness of test results and fair treatment of individuals.

Three months ago the Montana Chamber visited thirteen communities across Montana. In each community we discussed the central provisions of this bill with community leaders, employers, employees and chamber members. In every visit we found a strong core of citizens who support the intent of this bill.

SB 138 is desperately needed if Montana is to cope with drug abuse. We urge your support.

Exhibit #3
31 Jan 91

Senate Bill 138

My name is Ray Tilman. I am the Vice President of Human Resources for Montana Resources, a Copper Mining company in Butte.

One of the main responsibilities of my job is to insure that we provide a safe and healthy place for our 332 employees to work.

This is first of all mandated by the Federal Mine Safety and Health act where it states that we must not allow access on the mine property to anyone under the influence of Illegal Drugs or alcohol.

MSHA with the cooperation of many employee groups and Mining unions are presently putting on a nationwide Campaign to eliminate all use of illegal drugs at all mines in the US. This program includes pre-employment testing, random testing, employee assistance programs, and educational programs.

More important to the management of Montana Resources than this federal mandate is the personal commitment we made to our employees to keep our mine safe from the use of illegal drugs and

alcohol abuse. We view this as a promise to eliminate these problems and to help those suffering from these afflictions to get over them. We feel that the management of these problems encountered by a few will protect the health and safety of all other employees and the families of those few who have the problems.

Based on my 22 years of working in two hazardous industries in Montana, I can tell you that there are definitely problems with illegal drugs in the work place. I have seen them and helped many employees overcome them. These problems are not restricted to blue collar workers. Illegal drugs and alcohol abuse is occurring in the ranks of executives, doctors, lawyers, teachers, and state workers as well. Unfortunately the work place creates many safe havens for the sale, use, and storage of drugs and alcohol in employee lockers, lunchrooms, and private desks where Drug Enforcement officials have very limited access.

Senate Bill 138 will allow employers

who care about their employees and their families to legally address the problems is a systematic and balanced way that protects not only the rights of those using illegal drugs, but also the rights of their fellow workers who are subject to the results of the mistakes made by employees who are suffering from the use of illegal drugs or alcohol abuse. Senate Bill 138 does not require any employer to start a substance abuse program, but only lays out properly balanced procedures to follow if an employer cares enough about the investment he/she has made in employees who are having problems.

Programs like those spelled out in Senate Bill 138 are being used and supported by employers and Employees in many states and federal agencies such as the U.S. Armed Forces today.

Having worked with many Substance Abuse Counselors and Law Enforcement personnel through the years, two things have become very clear to me. 1. There are many employees who use illegal drugs at work and recreationally because work

is safer than on the street and employed people have the money to purchase illegal drugs. 2. Employers many times are in a much better position to put pressure on employees to get help than even those family members close to them because the Employer can either not hire them to begin with or they can take away their source of funds to purchase illegal drugs.

The present Montana Law not only prevents employers from setting up proactive Substance abuse programs, but it creates a safe haven for drug use and sales. If we truly want to help employees with problems, provide safer work places, and slow down the use of illegal drugs, we must change the law. I believe that Senate Bill 138 in it's present form is a giant step in the right direction. I would add however, that this private employer bill should be changed in the future to include all employers, because our substance abuse problem is not restricted to just private employers.

I would also like to note that I do

not believe Senate Bill 31 is even close to addressing the Substance Abuse problem we face in Montana. Arguing about what level is safe or induced by association is a way of totally avoiding the real problem. If you have any amount of illegal drugs in your system, you have broken the law by taking them because they were self induced, and you probably need some help, at least some counseling on what is legal and what drugs can do to you.

If you want to really do something to turn around substance abuse in Montana, I strongly urge you to vote for Senate Bill 138. It is a start in the right direction because it tells people with substance abuse problems that the leaders in the State of Montana are serious about stopping this waste of human potential and that you do not support breaking the law by encouraging those who need help to continue their substance practices. This position will surely encourage future leaders to continue this process for all employers and let our young future leaders know

Exhibit # 3
SB 138 1/31/91

Drugs are not good and if you choose to use them, you may not be employable.

Exhibit #4
31 Jan 91
SB 138

Date submitted: 1/31/91
SB 138
Curt Laingen

Mr. Chairman.....Members of the Committee, for the record, my name is Curt Laingen, Director of Safety for the Montana Motor Carriers Association.

A very important part of the commercial trucking industry's safety program is the drug testing program and MMCA strongly supports the passage of SB 138. Without its passage, the intrastate motor carrier industry cannot carry out the mandated federal transportation drug testing program in Montana.

MMCA has some 300 motor carrier members, 90% of whom operate in interstate commerce; some 200 log trucking members and some 150 livestock haulers, 90% of whom operate solely in intrastate commerce. Many of the interstate motor carrier members operate in both interstate and intrastate commerce. As of December 21, 1990, all interstate carriers and single owner operators must comply.

Under current Federal Department of Transportation Motor Carrier Safety rules, all operators...employee drivers and independent owner-operaters...of commercial motor vehicles, those over 26,000 pounds gross weight and those under 26,000 pounds transporting people and/or hazardous materials, must be subject to a qualified drug testing requirement. The Federal rules stipulate that the motor carrier employer, must institute a drug testing program under the strict parameters set out in federal rules (CFR Part 40).

For the information and benefit of the committee, I have attached a copy of the federal rules to this statement.

The rules spell out specific requirements for a drug testing policy to be adopted by the carrier, the drugs to be tested for, collection site procedures, testing and reporting procedures, and under what circumstances tests are to be performed.

Montana has adopted most all the Federal DOT Motor Carrier Safety Rules for operation by intrastate motor carriers of commodities and passengers except the rules dealing with drug testing.

Under Montana law, intrastate carriers are precluded from requesting blood and urine samples as a condition for employment and continuous employment. Only probable cause is grounds for testing under the law.

Motor carriers in Montana are faced with a serious problem of how to establish and comply with a drug-free operation when their drivers operating in Montana cannot be tested. The present law that SB 138 is attempting to change, mandates a policy that this Legislature and our Courts must adhere that says, in effect, that all drug user drivers, weeded out of the interstate motor carriage, can operate freely in Montana's intrastate motor carriage industry. Is this what we want?

Under this policy, the transportation industry and the federal government are mandating a drug-free transportation system to protect the public, while it would appear that Montana's transportation slogan is, "Come drive in Montana, where a driver can rest....cause we don't test."

Intrastate bus drivers can transport passengers without being tested and worse, "contracted for" school bus drivers do not have to be tested. It is hard to imagine that anyone can feel comfortable with that kind of policy.

A Montana carrier is concerned enough about his business and the well-being of his employees to conduct strict interviews, employee background checks and maintain a high standard for employment, but cannot complete the driver screening process to include drug testing.

SB 138, adopting the Private Workforce Drug Testing Act, is a needed and necessary piece of legislation in Montana. With its adoption, Montana can be free to consider the adoption, by reference, of the Federal DOT Controlled Substances Testing rules. We urge your adoption of SB 138. Thank you.

be a regularly employed driver of that motor carrier and who drives a vehicle that:

(1) Is a truck (as defined in §390.5 of this subchapter), and

(2) Is operated in retail delivery service, and

(3) Is transporting combustible liquids (as defined in §173.115 of this title), and

(4) Is operated in intrastate commerce.

SUBPART H - CONTROLLED SUBSTANCES TESTING

(**Note:** For readers convenience ATA has published 49 CFR Part 40 - Procedures For Transportation Workplace Drug Testing Programs as Appendix 1 to these regulations).

§391.81 Purpose and scope.

(a) The purpose of this subpart is to reduce highway accidents that result from driver use of controlled substances, thereby reducing fatalities, injuries, and property damage.

(b) This subpart prescribes minimum Federal Safety standards to detect and deter the use of controlled substances as defined in 49 CFR Part 40 (marijuana, cocaine, opiates, amphetamines and phencyclidine (PCP)).

(c) As part of reasonable cause drug testing programs established pursuant to this subpart, motor carriers may test for drugs in addition to those specified in this part only with approval granted by the Federal Highway Administrator under 49 CFR Part 40 and for substances for which the Department of Health and Human Services has established an approved testing protocol and positive threshold.

§391.83 Applicability.

(a) This subpart applies to motor carriers and persons who operate a commercial motor vehicle as defined in this subpart in interstate commerce and are subject to the driver qualification requirements of Part 391 of this subchapter.

(b) This subpart shall not apply to any person for whom compliance with this subpart would violate the domestic laws or policies of another country.

(c) This subpart is not applicable until January 2, 1992, with respect to any foreign-based employee of a foreign-domiciled carrier. On or before July 1, 1991, the Administrator shall issue any necessary amendment resolving the applicability of this subpart to such employee on and after January 2, 1992.

§391.85 Definitions.

As used in this subpart-

"Collection site" means a place where individuals present themselves for the purpose of providing body fluid or tissue samples to be analyzed for specified controlled substances. The site must possess all necessary personnel, materials, equipment, facilities, and supervision to provide for the collection, security, temporary storage, and transportation or shipment of the samples to a laboratory.

"Commercial motor vehicle" means any self-propelled or towed vehicle used on public highways in interstate commerce to transport passengers or property when:

(a) The vehicle has a gross vehicle weight rating or gross combination weight rating of 26,001 or more pounds; or

(b) The vehicle is designed to transport more than 15 passengers, including the driver; or

(c) The vehicle is used in the transportation of hazardous materials in a quantity requiring placarding under regulations issued by the Secretary under the Hazardous Materials Transportation Act (49 U.S.C. App. 1801-1813).

"Controlled substances" has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR 1308).

"Drivers subject to testing" means employee drivers and contract drivers under contract for 90 days or more in any period of 365 days.

"Drug" means any substance (other than alcohol) that is a controlled substance as defined in this section and 49 CFR part 40.

"FHWA" means the Federal Highway Administration, U.S. Department of Transportation.

"Interstate commerce" means trade, traffic, or transportation in the United States which is between a place in a State and a place outside of such State (including a place outside of the United States) or is between two places in a State through another State or a place outside of the United States.

"Medical practitioner" means a licensed doctor of medicine (MD) or osteopathy (DO) or a doctor of dental surgery (DDS) authorized to practice by the State in which the person practices.

"Medical Review Officer" means a licensed doctor of medicine or osteopathy with knowledge of drug abuse disorders that is employed or used by a motor carrier to conduct drug testing in accordance with this part.

"Motor carrier" means a for-hire motor carrier or a private motor carrier of property. The term "motor carrier" includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, the definition of "motor carrier" includes the terms "employer" and "exempt motor carrier."

"Random selection process" means that drug tests are unannounced and that every commercial motor vehicle driver of a motor carrier has an equal chance of being selected for testing.

"Reasonable cause" means that the motor carrier believes the actions or appearance or conduct of a commercial motor vehicle driver, on duty as defined in §395.2 of this subchapter, are indicative of the use of a controlled substance.

§391.87 Notification of test results and record-keeping.

(a) The MRO shall report to the motor carrier whether a driver's test was positive or negative and, if positive, the identity of the controlled substance for which the test was positive.

(b) A motor carrier shall notify its driver or driver-applicant of the results of a controlled substance test conducted under this subpart.

(c) A motor carrier shall notify--

(1) A driver-applicant of the results of a pre-employment controlled substance test conducted under this subpart provided the driver-applicant requests such results within 60 days of being notified of the disposition of the employment application; or

(2) A driver of the results of a periodic, random, reasonable cause, or post-accident test conducted under this subpart, provided the results were positive. The driver must also be advised of what controlled substance was identified in any positive test.

(d) A motor carrier shall ensure that all records related to the administration and results of the drug testing program for its drivers subject to the testing requirements are maintained for a minimum period of 5 years except that individual negative test results shall be maintained for a minimum of 12 months.

(e) A medical review officer shall be the sole custodian of individuals test results. The medical review officer shall retain the reports of individual test results for a minimum of 5 years.

(f) A motor carrier shall retain in the driver's qualification file such information that will indicate only the following:

(1) The types of controlled substances testing for which the driver submitted a urine specimen.

(2) The date of such collection.

(3) The location of such collection.

(4) The identity of person or entity:

(i) Performing the collection,

(ii) Analysis of the specimens, and

(iii) Serving as the MRO.

(5) Whether the test finding was "positive" or "negative" and, if "positive," the controlled substances identified in any positive test.

(g) A motor carrier shall produce upon demand and shall permit the Federal Highway Administrator to examine all records related to the administration and results of controlled substance testing performed under this part.

(h) A motor carrier shall maintain an annual (calendar year) summary of the records related to the administration and results of the controlled substance testing program performed under this subpart. This summary shall include at a minimum:

(1) The total number of controlled substance tests administered;

(2) The number of controlled substance tests administered in each category (i.e., pre-employment, periodic, reasonable cause, and random):

(3) The total number of individuals who did not pass a controlled substance test;

(4) The total number of individuals who did not pass a controlled substance test by testing category;

(5) The disposition of each individual who did not pass a controlled substance test;

(6) The number of controlled substances tests performed by a laboratory that indicated evidence of a prohibited controlled substance or metabolite in the screening test in a sufficient quantity to warrant a confirmatory test;

(7) The number of controlled substance tests performed by a laboratory that indicated evidence of a prohibited controlled substance or metabolite in the confirmatory test in a sufficient quantity to

(8) The number of controlled substance tests that were performed by a laboratory that indicated evidence of a prohibited controlled substance or metabolite in the confirmatory test in a sufficient quantity to be reported as a "positive" finding by substance category (e.g., marijuana, cocaine, opium, PCP, or amphetamine).

§391.89 Access to individual test results or test findings.

(a) No person may obtain the individual tests results retained by a medical review officer, and no medical review officer shall release the individual test results of any employee to any person, without first obtaining written authorization from the tested employee. Nothing in this paragraph shall prohibit a medical review officer from releasing, to the employing motor carrier, the information delineated in §391.87 (e) of this subpart.

(b) No person may obtain the information delineated in §391.87 (e) of this part and retained by a motor carrier, and no motor carrier shall release such information about any employee or previous employee, without first obtaining written authorization from the tested employee.

§391.93 Implementation schedule.

(a) This rule is effective December 21, 1988.

(b) Motor carriers with 50 or more "drivers subject to testing" on December 21, 1989, are required to implement a controlled substance testing program which meets the requirements of this subpart by:

(1) December 21, 1989, for "drivers subject to testing," and

(2) December 21, 1990, for all commercial motor vehicle drivers.

(c) Motor carriers with less than 50 "drivers subject to testing" on December 21, 1989 are required to implement a controlled substance testing program by December 21, 1990, for all commercial motor vehicle drivers.

(d) During the first 12 months following the institution of random drug testing pursuant to this rule, a motor carrier shall meet the following conditions:

(1) The random drug testing is spread reasonably through the 12-month period;

(2) The last test collection during the year is conducted at an annualized rate of 50 percent; and

(3) The total number of tests conducted during the 12 months is equal to at least 25 percent of the drivers subject to testing.

§391.95 Drug use prohibitions.

(a) No driver shall be on duty, as defined in §395.2 of this subchapter, if the driver uses any controlled substances, except as provided in §391.97 of this part.

(b) No driver shall be on duty, as defined in §395.2 of this subchapter, if the driver tests positive for use of controlled substances, except as provided in §391.97 of this part.

(c) A person who tests positive for the use of a controlled substance, as defined in 49 CFR Part 40, is medically unqualified to operate a commercial motor vehicle.

(d) A person who refuses to be tested under provisions of this subpart shall not be permitted to operate a commercial motor vehicle. Such refusal shall be treated as a positive test and subject the

§391.97 Prescribed drugs.

(a) *Affirmative defense.* Any driver who is alleged to have violated §391.95 of this subpart shall have available as an affirmative defense, to be proven by the driver through clear and convincing evidence, the his/her use of a controlled substance (except for methadone) was prescribed by a licensed medical practitioner who is familiar with the driver's medical history and assigned duties.

(b) The MRO shall afford a tested individual the opportunity to discuss a positive test result with the MRO before reporting the positive test result to the motor carrier. If an MRO, after making and documenting all reasonable efforts is unable to contact a tested person, the MRO shall contact a designated management official of the motor carrier to arrange for the individual to contact the MRO prior to going on duty. The MRO may verify a positive test without having communicated with the driver about the results of the test if:

(1) The driver expressly declines the opportunity to discuss the results of the test, or

(2) Within 5 days after a documented contact by a designated management official of the motor carrier instructing the driver to contact the MRO, the driver has not done so.

(c) All positive tests reported to the motor carrier by the MRO in which the MRO did not discuss the results with the driver shall be so noted and be accompanied by complete documentation of the MRO's efforts to contact the driver including contacts with a motor carrier's designated management official.

(d) The rules in this subpart do not prohibit a motor carrier from requiring a driver to notify the motor carrier of thereapeutic drug use.

§391.99 Reasonable cause testing requirements.

(a) A motor carrier shall require a driver to be tested, upon reasonable cause, for the use of controlled substances.

(b) A driver shall submit to testing, upon reasonable cause, for the use of controlled substances when requested to do so by the motor carrier.

(c) The conduct must be witnessed by at least two supervisors or company offficials, if feasible. If not feasible, only one supervisor or company official need witness the conduct. The witness or witnesses must have received training in the identification of actions, appearance, or conduct of a commercial motor vehicle driver which are indicative of the use of a controlled substance.

(d) The documentation of the driver's conduct shall be prepared and signed by the witnesses within 24 hours of the observed behavior or before the results of the tests are released, whichever is earlier.

§391.101 Reasonable cause testing procedures.

(a) A motor carrier shall ensure that the driver is transported immediately to a collection site for the collection of a urine sample.

(b) A motor carrier shall ensure that the test performed under the requirements of §391.99 of this Subpart conforms with 49 CFR Part 40 and this Subpart.

§391.103 Pre-employment testing requirements.

(a) A motor carrier shall require a driver-applicant to be tested for the use of controlled substances as a prequalification condition.

(b) A driver-applicant shall submit to controlled substance testing as a prequalification condition.

(c) Prior to collection of a urine sample under §391.107 of this subpart, a driver-applicant shall be notified that the sample will be tested for the presence of controlled substances.

(d) *Exceptions.* (1) A motor carrier may use a driver who is a regularly employed driver of another motor carrier without complying with paragraph (a) of this section, if the driver meets the requirement of §391.65 of this subchapter.

(2) A motor carrier may use a driver who is not tested by the motor carrier without complying with paragraph (a) of this section, provided the motor carrier assures itself

(i) That the driver has participated in a drug testing program that meets the requirements of this subpart within the previous 30 days and,

(ii) While participating in that program, was either

(A) tested for controlled substances within the past 6 months (from the date of application with the motor carrier) or

(B) participated in the drug testing program for the previous 12 months (from the date of application with the motor carrier).

(3) A motor carrier who exercises either paragraphs (d)(1) or (d)(2) of this section shall contact the controlled substances testing program in which the driver participates or participated and shall obtain the following information:

(i) Name and address of the program.

(ii) Verification that the driver participates or participated in the program.

(iii) Verification that the program conforms to 49 CFR Part 40.

(iv) Verification that the driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(v) The date the driver was last tested for controlled substances.

(vi) The results, positive or negative, of any test taken.

(4) The motor carrier shall retain the information required by this paragraph in the driver's qualification file required under §391.51 of this part.

(5) A motor carrier who uses, but does not employ, such a driver more than once a year must assure itself once every 6 months that the driver participates in a controlled substances testing program that meets the requirements of this subpart.

§391.105 Biennial (periodic) testing requirements.

(a) A motor carrier shall require a driver to be tested in accordance with the procedures set forth in this subpart and Part 40 of this title at least once every two years commencing with the driver's first medical examination required under §391.45 of this part after the motor carrier's implementation of a drug testing program in accordance with this subpart.

(b) *Exception.* A motor carrier may use a driver who participates in a drug testing program of another motor carrier or controlled substance test consortium.

periodic testing after a driver has been tested at least once under

(1) The requirements of paragraph (a) of this section;

(2) The requirements of §391.103 of this Subpart; or

(3) The requirements of §391.109 of this Subpart, and the motor carrier is testing its drivers at a 50 percent rate under its random testing program as required by §391.109 of this Subpart.

§391.107 Pre-employment and biennial testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A motor carrier shall ensure that the test performed under the requirements of §391.105 of this Subpart conforms with 49 CFR Part 40 and this Subpart.

§391.109 Random testing requirements.

(EDITOR'S NOTE: Implementation of random testing is deferred until further notice.)

(a) The number of tests conducted under this section annually shall equal or exceed 50 percent (50%) of the average number of commercial motor vehicle driver positions for which testing is required to be tested under this subpart.

(b) A motor carrier shall use a random selection process to select and request a driver to be tested for the use of controlled substances.

(c) A driver shall submit to controlled substance testing when selected by a random selection process used by a motor carrier.

(d) *Exception.* A motor carrier may use the results of another's controlled substances testing program that a driver participates in to meet the requirements of this section provided that the motor carrier obtains the following information from the controlled substances testing program entity:

(1) Name and address of the program.

(2) Verification that the driver participates in the program.

(3) Verification that program conforms to the 49 CFR Part 40.

(4) Verification that driver is qualified under the rules of this part, including that the driver has not refused to be tested for controlled substances.

(5) The date the driver was last tested for controlled substances.

(6) The results, positive or negative, of any tests taken.

§391.111 Random testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A motor carrier shall ensure that the test performed under the requirements of §391.109 of this Subpart conforms with 49 CFR Part 40 and this Subpart.

§391.113 Post accident testing requirements.

(EDITOR'S NOTE: Implementation of post accident testing is deferred until further notice.)

(a) A driver shall provide a urine sample to be tested for the use of controlled substances as soon as possible, but no later than 32 hours, after a reportable accident if the driver of the commercial motor vehicle receives a citation for a moving traffic violation arising from the accident.

(b) A driver who is seriously injured and cannot provide a specimen at the time of the accident shall provide the necessary authorization for obtaining hospital reports and other documents that would indicate whether there were any controlled substances in his/her system.

(c) A motor carrier shall provide drivers with necessary information and procedures so that the driver will be able to meet the requirement of paragraph (a) of this section.

§391.115 Post-accident testing procedures.

(a) The sample shall consist of a urine specimen.

(b) A driver shall ensure that a specimen is collected and forwarded to a National Institute on Drug Abuse (NIDA) certified laboratory in a manner which conforms to 49 CFR Part 40.

(c) A motor carrier shall ensure that the test performed under the requirements of Section 391.113 of this Subpart conforms with 49 CFR Part 40 and this Subpart.

§391.117 Disqualification.

(a) *Disqualification for refusal.* Except for a driver who meets the conditions of §391.113(b), a driver shall be disqualified by issuance of a letter of disqualification for a period of 1 year following a refusal to give a urine sample when the driver has been involved in a fatal accident.

(b) *Disqualification for use of controlled substances.*

A driver shall be disqualified by issuance of a letter of disqualification for a period of 1 year for a positive test of controlled substance use when the driver has been involved in a fatal accident.

§391.119 Employee Assistance Program (EAP).

(a) Every motor carrier shall establish an EAP program. The EAP program shall, as a minimum, include-

(1) An educational and training component for drivers which addresses controlled substances;

(2) An education and training component for supervisory personnel and company officials which addresses controlled substances; and

(3) A written statement, on file and available for inspection, at the motor carrier's principal place of business, outlining the motor carrier's EAP.

§391.121 EAP training program.

(a) Each EAP shall consist of an effective training program for the motor carrier's supervisory personnel and all drivers.

(b) The training program must include at least the following elements:

(1) The effects and consequences of controlled substance use on personal health, safety, and the work environment;

(2) The manifestations and behavioral changes that may indicate controlled substance use or abuse; and

(3) Documentation of training given to drivers and motor carrier supervisory personnel.

(c) EAP training programs for all drivers and supervisory personnel must consist of at least 60 minutes of training.

§391.123 After-care monitoring.

After returning to work, drivers who test positive must continue in any after-care program and be subject to follow-up testing for not longer than 60 months following return to work.

Exhibit #5
31 Jan 91
SB 138

GOLDEN SUNLIGHT MINES, INC.

January 31, 1991

Senate Bill No. 138

Donald E. Jenkins

Mr. Chairman, Members of the Committee:

For the record, my name is Donald E. Jenkins. I am Director, Government Relations for Placer Dome U.S. Inc., the parent company of the Golden Sunlight Mine near Whitehall. Before I assumed my present position, I was the Administrative Superintendent at the Golden Sunlight and part of my responsibility was in the Human Resource area. The drug problem was a part of that job.

Presently, there is a large nation-wide movement for a drug free America. We see it in the media all of the time. I agree with the movement and I can not see why anyone would not endorse such a move. This Bill, SB 138, is a step in the right direction to accomplish the goal of a drug-free America. I don't think this bill has anything in it that is any different than what is happening at most industrial operations presently.

At the Golden Sunlight we have had about three cases where employees have been involved in drugs and it has effected their performance on the job. We did not take disciplinary action against them but rather we worked with them and encouraged them

to go to a rehabilitation facility for treatment. We went the extra mile and arranged for the program and gave them full pay and benefits while they were in treatment. We also saw to it that their families were taken care of while they were absent.

In those three cases, the employees returned and once again became very productive employees. All three have since told us how thankful they are that they work for a company that cares. Of course, all of these cases were kept confidential.

However, we are certain that others in our work force are also using drugs and we can only hope that our people that have been rehabilitated will somehow get the word to these people to come forward so we may help them also. We are here and want to provide that help for them.

I endorse Senate Bill 138, perhaps it doesn't go far enough, but it certainly will help. Thank you.

Exhibit #6
SB 138
31 Jan 91

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 31 day of JANUARY, 1991.

Name: RANDLE ROMNEY, PRESIDENT, MONTANA COUNCIL BSA

Address: STAR RT BOX 146

CLANCY, MONTANA

Telephone Number: 442 0391

Representing whom?

MONTANA COUNCIL, BOY SCOUTS OF AMERICA

Appearing on which proposal?

SB 138

Do you: Support? X Amend?_____ Oppose?_____

Comments:

AS A LEADER OF YOUTH IN THIS STATE, WE ARE INTERESTED IN CONTROLLING THE USE OF DRUGS IN THE WORKPLACE WHICH WE FEEL WILL HELP CONTROL THE USE OF DRUGS IN THE HOME. YOUNG PEOPLE ARE GREATLY INFLUENCED BY WHAT THEY SEE THEIR PARENTS AND OTHERS DO IN THE HOME. IF DRUGS ARE CONTROLLED IN THE HOME, WE HAVE MORE SUCCESS IN CONTROLLING THE USE BY OUR YOUTH WHEN THEY ARE OUTSIDE THE HOME. THEY WAY THIS BILL IS DRAFTED WILL PROTECT OUR YOUTH AS WELL AS THE PRIVACY OF THOSE BEING TESTED.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

SB 138
31 Jan 91
Exhibit 4

OCAW
Oil, Chemical & Atomic Workers
International Union, AFL-CIO

Dan C. Edwards
International Representative
P.O. Box 21635
Billings, MT 59104
406 / 669-3253 (Home)

January 30, 1991

Dear Senator:

Shortly before the 1991 session began all legislators received a letter and prepared materials from IBM lobbyist Steve Browning under the heading of "Montanans for a Drug-Free Society". MFDFS is an employer dominated group lead by the Corporate giants IBM and Exxon. The materials included a draft bill. Browning's bill has now been introduced in the Senate as SB 138. The bill was introduced by Senator Stimatz.

Browning writes of decriminalizing drug testing. It appears that Steve has confused decriminalization with immunity. In reality, SB 138 removes almost all liability concerns for employers who elect to conduct urine testing on their employees. The practical effect of the "Limitation on Employer Liability" section is that for an action to be successful against an employer malice must be proven, even if an employer has committed defamation of character, libel, slander, damage to reputation. The end result is that an employee who has wrongfully been wrongly accused of being a drug-user has no course of action against an employer. Likewise, an employee has no chance of recovery for incorrect laboratory results which label him or her as a drug-user.

Simply put, SB 138 allows employers to conduct any kind of testing, including random testing[1], they wish. Employers can use any cutoff levels they want. The only positive action SB 138 requires is that urine testing must be conducted by a laboratory certified by the National Institute on Drug Abuse (NIDA). SB 31 already does this.

Montana's current drug testing law, as amended by SB 31, is a good law that will provide the positive aspect of SB 138, while still protecting employee's legitimate privacy rights. Employers retain the right to conduct drug testing where an employer has just cause.

I urge you to reject SB 138, and to support SB 31.

Yours truly,

Dan C. Edwards,
International Representative

[1]. At least two major corporations would begin random drug testing of its Montana employees as soon as SB 138 became law.

Exhibit # 7
SB 138 1/31/91

REVIEW of SB 138

(The IBM, Exxon bill that guts Montana's good drug testing law)

WHAT SB 138 DOES

Limitation on employer liability:

For all practical purposes, SB 138 relieves employers of all liability that might result from conducting drug testing. The law requires bad faith and acts to be done with malice before there is any chance of recovery. These requirements are extremely difficult to meet.

At first blush, it looks like SB 138 might even prohibit arbitration awards from requiring back pay.

Confidentiality:

The bill has language regarding confidentiality. BUT, in cases where there is any injury, or an accident with $5000 in damage, the employee has NO confidentiality.

NIDA cutoff levels:

While the bill requires that NIDA certified labs be used, it allows employers to use any cutoff levels they choose.

Will add costs for many employers currently doing drug testing:

The requirement for a Medical Review Officer (MRO) will add significantly to costs. Probably at least $10.00 per test.

FACTS TO CONSIDER

1. Allows any kind of testing, and under any circumstances, the employer wishes, including random.

2. Nothing to require current NIDA cutoffs. Employers can use any cutoffs they wish.

3. While bill talks about EAP's, rehabilitation, etc., it does not require any employer to offer any such assistance to employees. Perfectly legal to discharge for any positive test.

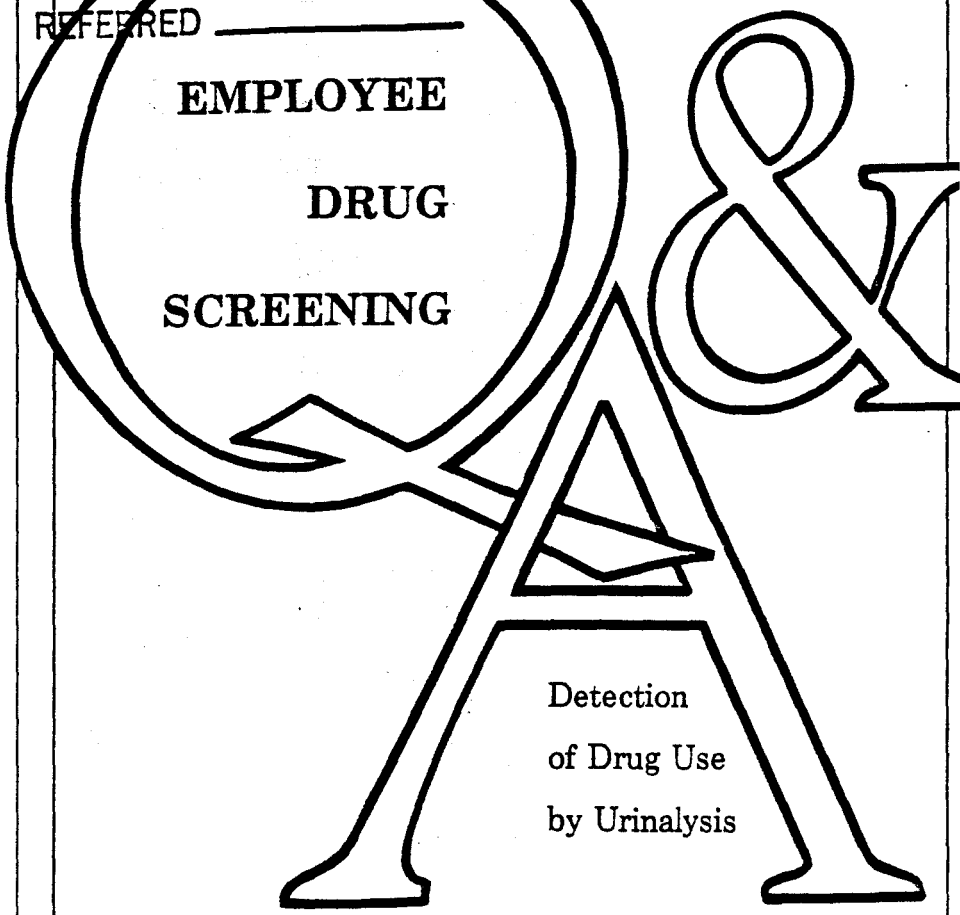
4. This bill is primarily aimed at relieving employers of any liability for drug testing, and offers no protection (other than requirement of NIDA certified laboratory) to employees.

Simply put, this bill eliminates the employee protections contained in the current law, while giving employers virtual protection from any form of liability. The only positive aspect is the requirement of a NIDA approved lab-

Exhibit # 7
SB 138 1/31/91

National Institute on Drug Abuse

EMPLOYEE DRUG SCREENING



Detection of Drug Use by Urinalysis

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Public Health Service
Alcohol, Drug Abuse, and Mental Health Administration

Q. Who should set up a drug screening program? How does one develop a policy?

A. The first priority should be to establish whether there is a need for a screening program. Is drug use present and significant? Can a drug use deterrent be established by means other than urine screening? The decision of whether or not to establish a drug-testing program will also depend to a large extent on the work setting. The initial question that management should consider is, "What is the purpose for testing?" The key concerns must be for the health and safety of all employees (i.e., early identification and referral for treatment) and to assure that any drug detection or screening procedure would be carried out with reasonable regard for the personal privacy and dignity of the worker.

The second critical question to consider is, "What will you do when employees are identified as drug users?" Once these issues are clarified, drafting a policy should be relatively easy.

Q. What level of drug in the urine indicates an individual is impaired?

A. Although urine screening technology is extremely effective in determining previous drug use, the positive results of a urine screen cannot be used to prove intoxication or impaired performance. Inert drug metabolites may appear in urine for several days, even weeks (depending upon the drug), without related impairment. However, positive urine screens do provide evidence of prior drug use.

Q. How reliable are urinalysis methods?

A. A variety of methods are available to laboratories for drug screening through urinalysis. Most of these are suitable for determining the presence or absence of a drug

Exhibit # 7
SB 138 1/31/91

Alcohol & Drugs in the Workplace:

Costs, Controls, and Controversies

A BNA Special Report

THE BUREAU OF NATIONAL AFFAIRS, INC.

abuse by Federal employees. State and local governments and leaders in the private sector should support unequivocally a similar policy that any and all use of drugs is unacceptable. Government contracts should not be awarded to companies that fail to implement drug programs, including suitable drug testing. . . .

"Government and private sector employers who do not already require drug testing of job applicants and current employees should consider the appropriateness of such a testing program."

Powerful Deterrent Effect

Drug testing advocates point to a number of reasons why employers should consider testing programs. Some, such as the Organized Crime Commission, view testing as a key element of an overall public effort to rid the nation of illegal drugs and the many social and economic problems they create. Drug tests will reduce demand for illegal drugs, the report says, by deterring their use.

A related point is made by Dr. Michael Walsh, chief of clinical and behavioral programs for the Nation Institute on Drug Abuse. Observing that much drug use is tied to peer pressure applied in social settings, he said, "I believe in my own mind that there is a healthy segment of the population that would like to have a reason for saying 'no thanks.' "

Drug testing, according to its advocates, provides the necessary incentive in many cases. "Quite often, people faced with a test will stop using drugs — 85 to 90 percent of them — because they are so linked to their work," said Robert Angarola, a Washington, D.C.-based management attorney.

Evidence for this can be found in the military. The U.S. Navy, which in 1980 found 47 percent of seamen under age 26 admitting use of illegal drugs — mostly marijuana — within the previous month, saw the rate fall to 4 percent after it implemented a drug testing regimen, according to Dr. Robert Willette, an Annapolis, Md.-based testing specialist and a consultant to the Navy testing program.

These drug use reductions have coincided with impressive improvements in accidents rates, work quality, discipline, and absenteeism rates, and employee morale, say testing advocates and companies willing to discuss the results of testing programs. One such firm, Southern Pacific Transportation Corp., has experienced a 67 percent decline in accidents since it instituted its broad-based testing program, said Bob Taggart, SP's vice president for public affairs. He said the program, which has included random screens of workers both on and off the rails, has been supported by many employees who are concerned about the impact of drug use on safety and productivity.

Opposition Increases

In spite of these success stories, and to some degree because of them, drug tests have become highly controversial. Protests are coming from several quarters — unions and civil liberties advocates are among the leading critics — and the protests are directed at a number of issues. These critics say that drug tests can:

- Produce erroneous results;
- Create employee and union relations difficulties;
- Invade employee privacy; and
- Fail to indicate whether an employee is actually impaired by a drug.

In addition, most tests are directed at drug use, not alcohol use which can be equally impairing and, according to many studies, is a more widespread problem

Exhibit # 7
SB 138 1/31/91

While a few critics flatly oppose the use of drug tests in the employme context, many believe there are circumstances in which testing — proper conducted — may be called for. Their concern is directed at what is perceived widespread misuse and misunderstanding of drug tests, and, among union obse ers, the fact that testing is sometimes implemented unilaterally by manageme Nonetheless, there are serious concerns about the tests themselves.

Urine Tests Cannot Show Impairment

One of the most controversial aspects of testing has to do with what, precise tests indicate about drug use. Critics charge that many employers are under t impression, or let themselves believe, that a positive urine test indicates employee is impaired at that moment. According to a wide variety of experts, th conclusion is erroneous.

"Testing does only one thing," said Dr. Ronald Seigel, a psychopharmacolg at the UCLA School of Medicine. "It detects what is being tested. It does not t us anything about the recency of use, it does not tell us anything about how th person was exposed to the drug, it doesn't even tell us whether it affect performance." Dr. Fredric Rieders, president and laboratory director of Natio Medical Services, one of the foremost testing laboratories, agreed. "Urine testi alone serves only to tell us an agent is present — not whether it is impairing."

The difficulty is that urine is a waste material, and that chemicals found in may or may not still be circulating in the bloodstream, where they can aff human performance. In the case of marijuana, a positive urine test may showing consumption that occurred weeks earlier.

Even if blood is tested — a much more expensive, and some believe, persona invasive approach — there are significant problems determining impairment drugs other than alcohol. (See *The Chemical Abuse Profile*.) One extre example of this is PCP, a hallucinogen. An individual can be in a virt "catatonic state" from use of the drug and yet test negative for the drug in bl and urine, according to Seigel. On the other hand, he said, an individual can t positive for PCP in blood and urine and show no signs of impairment.

Unintentional Drug Consumption

A related problem with urine tests has to do with positive tests for unintentio exposure to substances. Marijuana is most frequently mentioned because of risk of "passive inhalation" of smoke.

"Small amounts of unlawful substances does not indicate the employee ha problem at all," said Alfred Klein, a Los Angeles-based management attorney. Southern California, where I live, it is not uncommon for marijuana smoke blow into your face in public places, [such as at] outdoor concerts," he said. "A I'm not talking about rock concerts. I'm talking about the Los Angeles Phil monic at the Hollywood Bowl."

Leading urine test manufacturers, such as Hoffman-LaRoche and Syva Cor ration, acknowledge the potential for positive tests due to passive inhalation marijuana smoke. However, both firms say they have taken precautions agai this, by recommending that laboratories refuse to label "positive" those urine t with minute quantities of marijuana residues.

Marijuana is not the only drug posing this type of problem. Drinking of cert herbal teas will produce a positive test for cocaine, Seigel reported. The t although they [illegible] not [illegible] [illegible] the [illegible]

Exhibit #6
31 Jan. 91
SB 138

DONALD R. JUDGE
EXECUTIVE SECRETARY

110 WEST 13TH STREET
P.O. BOX 1176
HELENA, MONTANA 59624

(406) 442-1708

TESTIMONY OF DON JUDGE ON SENATE BILL 138 BEFORE THE SENATE JUDICIARY COMMITTEE, JANUARY 31, 1991

Mr. Chairman and members of the Committee, for the record my name is Don Judge representing the Montana State AFL-CIO, and we are here to strongly oppose Senate Bill 138 which would adopt the private workforce drug testing act.

It's too bad we can't say that the private workforce is immune from the problems of drug and alcohol abuse. Substance abuse by workers is a hazard to their own personal safety as well as that of the public. This does not, however, justify the intrusion of personal privacy by random drug testing or "employee screening." Drug testing remains a delicate balancing act between public safety and employee privacy.

The AFL-CIO does not condone the use of controlled substances or the abuse of alcohol, in the workplace or otherwise. We recognize the importance of public safety and employer liability, but we also recognize the need for a worker's safety, privacy and integrity.

Currently, under Montana law, it is illegal for an employer to require an applicant to submit a blood or urine sample as a condition for employment. It is also unlawful for an employer to use drug testing as a condition for continued employment, excepting cases were an employer believes that a workers faculties are impaired on the job due to alcohol consumption or illegal drug use. This is as it should be.

Instead of reinforcing Montana's existing good law, Senate Bill 138 would strip employees and perspective employees of job security and potential employment for no other reason than an employers whim. Existing law allows for drug testing only for cases of employment in hazardous work environments, or where security, public safety, or fiduciary responsibility is at risk. Senate Bill 138 would allow drug testing to be used as a screening process for all current and prospective employees, regardless of the position, with no evidence or justification for such action.

This is fundamentally and morally wrong in a country where all people are considered innocent until proven guilty, and where they are not obliged to incriminate themselves.

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One of the many delicate issues in this matter is that of confidentiality. This bill would allow test results to become public in cases where property damage resulted in an excess of $5000. In today's expensive business world, $5000 can be a small accident. And a worker falsely accused could bear the public consequence of such exposure forever! And the price for a worker falsely accused; a lost job, a lost career, a lifetime of lost earnings, perhaps a broken family? Senate Bill 138 fails to take this into account.

A drug or alcohol problem is recognized as a disease by the American Medical Association. It is best addressed through compassion and treatment, not intimidation, harassment, and fear. This bill represents a dark ages approach to a pressing social problem.

Senate Bill 138 is a bill to relieve employers of all liability and burden of proof. It strips away personal privacy and integrity. It voids Montana's strong law. For these reasons we urge you not to pass this bill. Thank you for your consideration of our position.

Larry Middagh
SB 138

Exhibit #9
31 Jan 91
SB 138

I am a small business owner. I have 26 employees. I oppose this bill not because I condone drug use, I don't. I oppose this bill because of its blatant disregard for the rights of those hard working citizens who, with their willingness to work for us, make our capitalistic system as successful as it is. Citing drug abuse as a reason to deny anyone their basic human rights is like cutting off your arm to fix a hang nail. The solution is too radical for the problem.

Although I own my own business, I've spent a number of years on the other side of the fence. I am able to view this issue from both perspectives. I believe that a positive employer/employee relationship is the key to a successful business and that this relationship is built on trust. Drug testing is management's way of saying 'we don't trust you". Destroying this fragile relationship will create an us-verses-them situation and lead to poor worker performance.

I am also bothered by the reversal of a basic American right, that of innocent until proven guilty. This bill implies that all employees are guilty of drug use until their tests prove otherwise. I also wonder about drug tests for management and ownership. Do they have to take the tests? What makes ownership immune to drug testing?

Most employees have problems now and then, we all do. It doesn't matter if the problem is alcohol abuse, gambling, low self-esteem or drug use. It's still a problem that management must deal with, to the best of its ability, on a personal level. Each worker is different, some can be helped, some can't. Random drug tests and dismissal are not going to address the problems of a drug addicted employee. This bill shows very little respect for the employee. This bill seems to view the worker as a necessary evil. That worker is the most important ingredient in any success story. He deserves a little more respect than this.

To me this is one of those "if it ain't broke don't fix it" situations. The current drug testing law is a good law. I support SB 31.

Exhibit #10
31 Jan 91
SB 138

ACLU OF MONTANA

AMERICAN CIVIL LIBERTIES UNION

P. O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086

DRUG TESTING TESTIMONY

State Office
335 Stapleton Building
Billings, Montana 59101

BOB ROWE
President

SCOTT CRICHTON
Executive Director

JEFFREY T. RENZ
Litigation Director

I am testifying as the Executive Director of the American Civil Liberties Union of Montana on behalf of my board of directors and the 800 families that pay dues to our organization so that we might work to preserve the protections afforded us by the Constitution and the Bill of Rights.

There was a time in the United States when your business was also your boss's business. At the turn of the century, company snooping was pervasive and privacy almost non-existent. Your boss had the right to know who you lived with, what you drank, whether you went to church, or to what political groups you belonged. With the growth of the trade union movement and heightened awareness of the importance of individual rights, American workers came to insist that life off the job was their private affair not to be scrutinized by employers.

But major chinks have begun to appear in the wall that has separated life on and off the job, largely due to new technologies that make it possible for employers to monitor their employees off-duty activities. Today, millions of American workers every year, in both the public and private sectors, are subjected to urinalysis drug tests as a condition for getting or keeping a job.

The American Civil Liberties Union opposes indiscriminate urine testing because the process is both unfair and unnecessary. It is unfair to force workers who are not even suspected of using drugs, and whose job performance is satisfactory, to "prove" their innocence through a degrading and uncertain procedure that violates personal privacy. Such tests are unnecessary because they cannot detect impairment and, thus, in no way enhance an employer's ability to evaluate or predict job performance.

Employers have a right to expect their employees not to be high, stoned, drunk, or asleep. Job performance is the bottom line: If you cannot

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do the work, employers have a legitimate reason for firing you. But urine tests do not measure job performance. Even a confirmed "positive" provides no evidence of present intoxication or impairment; it merely indicates that a person may have taken a drug at some time in the past.

Urine tests cannot determine precisely when a particular drug was used. They can only detect "metabolites," or inactive, leftover traces of previously ingested substances. For example, an employee who smokes marijuana on a Saturday night may test positive the following Wednesday, long after the drug has ceased to have any effect. In that case, what the employee did on Saturday has nothing to do with his or her fitness on Wednesday. At the same time, a worker can snort cocaine on the way to work and test negative that same morning. That is because the cocaine has not yet been metabolized and will, therefore, not show up in his urine.

You'll hear the question, "If you don't use drugs, you have nothing to hide- so why object to testing?" Innocent people do have something to hide: their private life. The "right to be left alone" is, in the words of the late Supreme Court Justice Louis Brandeis, "the most comprehensive of rights and the right most valued by civilized men."

Analysis of a person's urine can disclose many details about that person's private life other than drug use. It can tell an employer whether an employee or a job applicant is being treated for a heart condition, depression, epilepsy or diabetes. It can also reveal whether an employee is pregnant.

Drug screens are not completely reliable. These tests can and often do yield false positive results. The ACLU in Montana has heard stories from numerous individuals whose jobs require testing about how false positives have sent their lives into real disarray. Although more accurate testing is becoming available, it is expensive and less frequently used. And even the more accurate tests can yield inaccurate results due to laboratory error. A survey by the National Institute of Drug Abuse (NIDA) found that 20 percent of the labs surveyed mistakenly reported the presence of illegal drugs in drug-free urine samples. Unreliability also stems from the tendency of drug screens to confuse similar compounds. For example, codeine and Vicks Formula 44-M have been known to produce positive results for heroin, Advil for marijuana, and Nyquil for amphetamines.

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Such testing may be the easiest way to identify drug users, but it is also the most un-American. Americans have traditionally believed that general searches of innocent people are unfair. This tradition began when King George's soldiers searched everyone indiscriminately in order to uncover those few people who were committing offenses against the Crown. Early Americans deeply hated these general searches, which were a leading cause of the Revolution.

After the Revolution, when memories of the experience with warrantless searches were still fresh,the Fourth Amendment was adopted. It says that the government cannot search everyone to find the few who might be guilty of an offense. The government must have good reason to suspect a particular person before subjecting him or her to intrusive body searches. These long-standing principles of fairness should apply to the private sector, even though the Fourth Amendment only applies to government action.

Urine tests are body searches, and they are an unprecedented invasion of privacy. The standard practice, in administering such tests, is to require employees to urinate in the presence of a witness to guard against specimen tampering. In the words of one judge, that is "an experience which even courteously supervised can be humiliating and degrading." Noted a federal judge, as he invalidated a drug-testing program for municipal fire-fighters, "Drug testing is a form of surveillance, albeit a technological one."

Shouldn't exceptions be made for certain workers such as airline pilots are responsible for the lives of others? Obviously, people who are responsible for others' lives should be held to high standards of job performance. But urine testing will not help employers do that because it does not detect impairment.

If employers in transportation and other industries are really concerned about the public's safety, they should abandon imperfect urine testing and test performance instead. Computer- assisted performance tests already exist and, in fact, have been used for years by NASA on astronauts and test pilots. These tests can actually measure hand-eye coordination and response time, do not invade people's privacy, and can improve safety far better than drug tests can.

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Drug use costs industry millions in lost worker productivity each year. Don't employers have a right to test as a way of protecting their investment?

Actually, there are no clear estimates about the economic costs to industry resulting from drug use by workers. Proponents of drug testing claim the costs are high, but they have been hard pressed to translate that claim into real figures. And some who make such claims are manufacturers of drug tests, who obviously stand to profit from industry-wide urinalysis. In any event, employers have better ways to maintain high productivity, as well as to identify and help employees with drug problems. Competent supervision, professional counseling and voluntary rehabilitation programs may not be as simple as a drug test, but they are a better investment in America.

Our nation's experience with cigarette smoking is a good example of what education and voluntary rehabilitation can accomplish. Since 1965, the proportion of Americans who smoke cigarettes has gone down from 40.4 percent to 29.1 percent. This dramatic decrease was a consequence of public education and the availability of treatment on demand. Unfortunately, instead of adequately funding drug clinics and educational programs, the government has cut these services so that substance abusers sometimes have to wait for months before receiving treatment.

Many state and federal courts have ruled that testing programs in public workplaces are unconstitutional if they are not based on some kind of individualized suspicion. Throughout the country, courts have struck down programs that randomly tested police officers, fire-fighters, teachers, civilian army employees, prison guards and employees of several federal agencies. The ACLU and public employees unions have represented most of these victorious workers. In Washington, D.C., for example, one federal judge had this to say about a random drug testing program that would affect thousands of government employees: "This case presents for judicial consideration a wholesale deprivation of the most fundamental privacy rights of thousands upon thousands of loyal, law abiding citizens..."

In 1989, for the first time, the U.S. Supreme Court ruled on the constitutionality of testing government employees not actually suspected of

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drug use. In two cases involving U.S. Customs guards and railroad workers, the majority of the Court held that urine tests are searches, but that these particular employees could be tested without being suspected drug users on the grounds that their Fourth Amendment right to privacy was outweighed by the government's interest in maintaining a drug-free workplace.

Although these decision represent a serious setback, the Court's ruling does not affect all government workers, and the fight over the constitutionality of testing is far from over.

Court challenges to drug testing programs in private workplaces are underway throughout the country. These lawsuits involve state constitutional and statutory laws rather than federal constitutional law. Some are based on common law actions that charge specific, intentional injuries; others are breach of contract claims. Some have been successful while others have failed. Traditionally, employers in the private sector have had extremely broad discretion in personnel matters.

In most states, private sector employees have virtually no protection against drug testing's intrusion on their privacy, unless they belong to a union that has negotiated the prohibition or restriction of workplace testing.

Montana is one of only eight states that has enacted protective legislation that restricts drug testing in the private workplace and gives employees some measure of protection from unfair and unreliable testing. Montana, Iowa, Vermont and Rhode Island have banned all random or blanket drug testing of employees (that is, testing without probable cause or reasonable suspicion), and Minnesota, maine and Connecticut permit random testing only of employees in "safety sensitive" positions. The laws in these states also mandate confirmatory testing, use of certified laboratories, confidentiality of test results and other procedural protections. While they are not perfect, these new laws place significant limit on employers' otherwise unfettered authority to test and give employees the power to resist unwarranted invasions of privacy.

The ACLU will continue to press other states to pass similar statutes and to lobby the U.S. Congress to do the same.

I urge you to reject SB 138.

Exhibit #11
31 Jan 91
SB 138

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 31ST day of JANUARY, 1991.

Name: JAY RENTON

Address: P.O Box 70

EAST HELENA MT 59635

Telephone Number: 227-6937

Representing whom?

USWA Local 72

Appearing on which proposal?

SB 138

Do you: Support?____ Amend?____ Oppose? ✓

Comments:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

Exhibit # 11
SB 138 1/31/91

Mr. Chairman members of the Committee My name is Jay Retterton I'm President of Local 72 of the USWA Representing 210 Employee's at ASARCO's East Helena Plant. I'm here today to testify AGAINST SB 138 "The Private Workforce Drug Testing Act" Proponants of SB138 have told you this Act provide's Protections for both employees & employers from the scourge of a drug ~~Crazed~~ impaired workforce. What this bill really does is trample employee rights that are protected under current Mt. law and

Exhibit # 11
SB 138 1/31/91

Gives employers the right to begin random blood urine testing without any evidence of job related impairment.

It provides's no sets no cutoff levels for determining what is a positive initial or confirmitory test.

It provides no [redacted] garentee that any employer who sets up implements a Drug Testing Program, will also set up an employee Assistance Program.

The employees I represent are currently covered under an Alchol + Drug Abuse Policy that was implemented on May 1st 1990

Exhibit # 11
SB 138 1/31/91

IT fits the guidelines of current Montana law. Since its implementation 7 months ago there has not been one employee tested under the program. Accidents in our plant are investigated jointly by the company and the union. Since the implementation of the Drug Testing Program. none of the accidents have been attributed to Drug or Alcohol impairment. If there is really a problem ~~and a for the~~ of Drug Abuse then why hasn't there been even one employee tested under the current policy in force today. If SB138 becomes law we would

Exhibit # 11
SB 138 1/31/91

In Closing Im appalled but not suprised by the insinuation that opponent's of this legislation condone drug use in the workplace. That insinuation disgusts me even more than this legislation.

Workers I represent place there live's on the line everyday. The last thing we need or want are employee's who are impaired on the job. ~~[illegible]~~ We also recognize that Alcol + drug Abuse are a diesese and the answer to the Problem are education and Rehabilitation.

Exhibit # 11
SB 138 1/31/91

Montana has been a leader in protecting its citizens right to privacy, SB 138 would infringe on those rights substantially.

Don't be caught up in the ~~petitioners~~ proponents rehtoric that this bill is needed to stop an unsubstantiated claim of a drug abuse problem in Montana workplace's. ~~AFT~~ SB. 138 will only cause conflict, fear and harassment in the workplace.

The way to stop Drug Abuse ~~is~~ is to provide a quality education and job opportunities to our children so they don't turn to drugs + Alchol for answers to there

Exhibit # 11
SB 138 1/31/91

Do Not Pass Recomendation to SB 138

Thank You.

Exhibit No.
SB 138
31 Jan 91

SENATE BILL 138 IS BASICALLY ONE THAT ALLOWS FOR RANDOM DRUG TESTING IN THE WORKPLACE. THIS TESTING IS AN INVASION OF PRIVACY BY ALLOWING EMPLOYERS TO TEST THE GREAT MAJORITY OF INNOCENT PEOPLE IN ORDER TO UNCOVER THE RELATIVELY FEW VIOLATORS. THE ACT OF BEING TESTED IN A RANDOM NATURE RESCINDS THE FUNDAMENTAL PREMISE OF AMERICAN LAW: THAT AN INDIVIDUAL IS INNOCENT UNTIL PROVEN GUILTY.

THE HARD FACTS, WHEN DEALING WITH THE DRUG ISSUE, ARE THAT THERE ARE NUMEROUS STIGMAS ATTACHED TO AN INDIVIDUAL REPUTED TO HAVE USED, OR BEEN TESTED FOR, USING DRUGS. THE PREMISE OF "INNOCENT UNTIL PROVEN GUILTY" MAY HOLD TRUE IN A COURT OF LAW, BUT IN THE REAL WORLD A "DRUGGIE" IS GUILTY IN THE EYES OF SOCIETY, UNTIL HE PROVES OTHERWISE. EVEN IF THAT INDIVIDUAL IS SUBSEQUENTLY EXONERATED OF ALL CHARGES, THE GENERAL PUBLIC STILL PERCIEVES HIM AS BEING ASSOCIATED WITH DRUGS.

I WOULD LIKE TO PUT THIS ON A PERSONAL NOTE. I HAVE COACHED LITTLE LEAGUE BASEBALL IN BILLINGS FOR THE PAST 20 YEARS. AS A COACH, I AM ENTRUSTED WITH YOUNG PEOPLE'S LIVES AND ATTITUDES ON A DAILY BASIS THROUGHOUT THE SUMMER. I CAN ASSURE YOU THAT PARENTS OF PRE-TEEN AND TEENAGE YOUNGSTERS ARE VERY PROTECTIVE AND GUARDED ABOUT WHO IS SHAPING THE LIVES OF THEIR CHILDREN. UNDER SENATE BILL 138, MY EMPLOYER, EXXON, WILL HAVE THE RIGHT TO TEST FOR DRUGS AT RANDOM. IF I AM SUBJECTED TO THIS TEST, AND THE CONFIDENTIALITY IS NOT MAINTAINED MY RELATIONSHIP WITH MY BASEBALL PLAYERS AND THEIR PARENTS WOULD BE ADVERSELY AFFECTED. IN THIS SITUATION, THE <u>RESULTS</u> OF THE TEST WOULD BE IMMATERIAL.... THE FACT THAT I WAS INDEED TESTED SENDS UP THE RED FLAG TO THE PARENTS THAT THE COACH IS A "DRUGGIE". NOW I ASK YOU - DO YOU WANT YOUR CHILD ASSOCIATING A PERSON WHO MUST BE TESTED FOR DRUGS? THE OUTCOME OF THE TESTS WON'T BE KNOWN, BUT THE FACT THAT THE TEST WAS ADMINISTERED WILL

In closing, let me state unequivocally that I have never, nor will I ever, knowingly or willingly take illicit drugs. I do not condone the use of drugs, and, in fact, use my coaching position as a podium in the education of my players against drugs.

At this time I would like to express my support for Senate Bill 31, as a means to strengthen the current Montana Laws concerning drug testing and the protection of citizens' rights. I am vehemently opposed to Senate Bill 138, as it indiscriminately erodes the basic Constitutional Rights of the citizens of this state.

Thank you.

Randy Ostermiller

Randy Ostermiller
609 Bazaar Exchange
Billings, Montana 59105
248-2302

Vice-Chairman, Exxon Group
O.C.A.W. Local 2-470

Exhibit 12a
1-31-91
SB 138

Mr. Chairman and Distinguished Members of the Senate:

My name is Dean Schanz. I am the Chairman of Local 2-470 of the Oil, Chemical and Atomic Workers International Union. I represent 160 hard working Montanans at the Exxon Company, U.S.A. Refinery in Billings, Montana.

I am here today to speak in opposition to Senate Bill 138. The provisions of SB 138 will, if passed, completely gut the current Montana Laws on drug testing. This bill will adversely affect the privacy of law abiding citizens of the State of Montana.

I am appalled to think that my job may be in jeopardy with the passage of SB 138. I am 34 years of age, have never used or tried any illegal drugs, and yet through this terrible bill I will be forced to urinate into a bottle, possibly under supervision, just to prove my innocents. This is an outright violation of my basic civil rights. Why should I have to undergo this humiliation and deformation, when I don't and have never used illegal drugs? I am positive my test results will be negative, but what happens if some samples are accidentally mixed up? If the test comes back positive, SB 138 dictates I have no legal avenues to follow as to vindicate myself. This scares me.

Under SB 138 I could test positive by taking a non-precription medicine like Advil, Nuprin or Motrin which can test positive for Marijuana; Nyquil, Contact and diet pills can be positive

Exhibit 129
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for amphetamines; Benadryl can test positive for Methadone; Vicks Cough Syrup positive for Heroin; Dristan and Hall's Cough Drops positive for alcohol; Having a cup of herbal tea can be positive for Cocaine, and eating poppy seed cake can make the results of a test positive for Heroin. Almost 100% of these medicines are taken so maybe I can show up at work healthy and feeling well enough to perform my duties. I find it frightening that I could be terminated because I tested positive after taking a non-prescription medicine. Under the current Montana Law and with the passage of Senate Bill 31, this is not a problem. I think you will all agree that none of the forementioned would cause a person to be visually impaired, which is the criteria for a drug test under the current Montana Law.

Under SB 138 a company could do drug testing, including random testing, and use any positive test level they want. Currently Exxon has a policy in place that sets levels for marijuana and alcohol far below the Federal D.O.T. levels. In the case of alcohol their level is .04%. 60% lower than Montana D.U.I. guidelines. Marijuana is at 20 nanograms, 80% lower than Federal D.O.T. levels. With these kinds of levels, false positive tests are much more likely to happen, futher risking innocent people. Exxon is unwilling to use the current Montana Law which is testing only because of probable cause or reasonable suspicion, to police their workplace -- my workplace.

EXHIBIT 12
1-31-91
SB 138

This last summer AND AGAIN BEFORE THE SESSION STARTED the plant manager at Exxon, John Genova, decided to have a get together with the elected officials of Yellowstone County. They were invited to the refinery to view the plant and to show them what Exxon has been doing about environmental concerns. After a presentation of such, he said he'd like to talk about drug testing. He stated that Exxon random tests at all their facilities except Billings and that was due to the bad laws we now have in Montana. He went on to say that the people at the Billings Refinery want random testing. He was angered that the big corporation of Exxon could not random drug test in Billings because of some dumb law the 1987 Montana Legislature passed. I am here to say that the 160 OCAW members I represent and a majority of the 90 non-represented workers who are affraid to express their views due to repprisals, at the Billings Exxon Refinery, DO NOT WANT RANDOM DRUG TESTING, which would be allowed under Senate Bill 138. In the seven years of my employment at the Billings Exxon REfinery there is not and never has been a drug abuse problem. I would like to ADD THAT IN THE 15 YEARS I HAVE WORKED IN INDUSTRY, including THE OCAW, BOILERMAKERS, AND OPERATING ENGINEERS I HAVE NEVER BEEN OFFERED DRUG

Mr. Chairman and distinguished members of the Senate, I strongly urge, on behalf of 160 hard working Montanans, to kill Senate Bill 138 and to give a do pass to Senate Bill 31 which makes the current Montana Drug Testing laws better.

Thank you,

Dean Schanz

Dean Schanz, Chairman, OCAW Local 2-470

EXXON GROUP

SB 138
1-31-91

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 31 day of January, 1991.

Name: Charles Kinsey

Address: 6860 Applegate

Telephone Number: 458-5820

Representing whom?
Steam Pipefitters Local Union 250

Appearing on which proposal?
SB 138

Do you: Support?____ Amend?____ Oppose? X

Comments:

I oppose this bill as an infringement of peoples rights.
(1) - Drug tests are not totally accurate
(2) Errors should require substantial compensation. Employer + testing Comp both liable
(3) Person should be based of test is in error.
(4) Considering the track record of big business in using anything to disrupt union developing in their industry - this would be a tool by them to frame any leader in this plant who might try to help organize

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

SB 138
1-31-91

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 31 day of Jan, 1991.

Name: Chuck Kanzy

Address: 6860 Applegate
Helena 59601

Telephone Number: 459-5620

Representing whom?
member Steering Committee MLIC

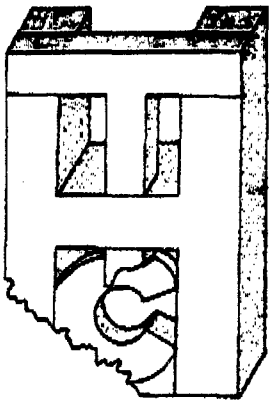
Appearing on which proposal?

Do you: Support?____ Amend?____ Oppose?____

Comments:
This is a dangerous tool to put in the hands of an employer in either organizing or labor disputes. Lost can be faked.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

FAX rec'd Pt 2 8:30am
1-24-91
SB 138



Toole County Hospital
and Nursing Home
640 Park Drive
P.O. Box P
Shelby, Montana 59474
Phone: 434-5536

Date: January 23, 1991

To: Senate Judiciary Committee (Room 418)

From: Roger J. Scheidler, Administrator

About: SB138 Private Work Force Drug Testing

Dear Senators:

I want to submit my support of drug testing among the work force. Obviously being in the health care arena, I am most concern about the potential (and experienced) impact that illegal drug addiction has on the safety and quality of health care services among health care workers.

I understand the most contentious point in this issue is privacy. I would like to point out that state laws have mandated for years that employees be tested for diseases as a condition of employment. Why? Who wants diseased persons caring directly for patients? May I suggest that the legitimate and necessary concern to many employers providing for public concerns is to screen applicants and employees who may be involved with drug dependencies. Is this any less or more an invasion to privacy than disease testing?

SB 138 not only allows for responsible intervention by all employers, but brings drug testing into focus even for present state governance in the same regard.

I urge your support of this bill. I earnestly believe it to be in the best interest of us all as well as each of our privacy.

Thank You!

Roger J. Scheidler, HFA

FAX 1-24-91
SB 138

KALISPELL REGIONAL HOSPITAL

"We care for your health."

January 24, 1991

Senator Pinsoneault

Dear Sir:

RE: S.B. 138 - Private Workforce Drug Testing Act

I am asking for your support on SB 138. It is my understanding that current Montana law makes it a crime under most circumstances for employees and job applicants to be tested for illegal drug use. I am also concerned that Montana's current law appears to provide virtually no privacy protection and little or no scientific testing procedures.

SB 138 has been drafted by the Montana Legislative Council and would decriminalize drug testing, provided that strict privacy protection and scientific testing standards were followed.

I realize that the work force drug testing bill will be a very controversial topic and opposed by organized labor and the Montana ACLU and the Montana Nurses Association.

Unfortunately, I am in a position to observe the results of drug abuse and I believe SB 138 goes a long way to help treat the underlying personal problems of work place drug abuse.

I appreciate your consideration.

Sincerely,

JIM OLIVERSON, Vice President
Clinical Services

JO/ses

Exhibit #13
1-31-91
SB 190

Northern Plains Resource Council

Senate Bill 190:

AN ACT REVISING THE METHOD OF ENFORCEMENT AND PENALTIES FOR UNFAIR TRADE PRACTICES

WHAT IS THE PURPOSE OF SB 190?

The purpose of Senate Bill 190, sponsored by Senator Cecil Weeding of Jordan, is to address several U.S. Supreme Court decisions which have severely limited who can take an action to enforce antitrust laws. It addresses through state law, what federal law does not currently cover. SB 190 allows any person or political subdivision who is injured "directly or indirectly" or the Attorney General on behalf of the injured, to take an action to enforce Montana's Unfair Trade Practices Act (30-14-201 et seq.). Fourteen states, plus the District of Columbia, have made similar amendments to their state law. Often these laws are referred to as "indirect purchaser provisions."

WHY DO WE CARE ABOUT THE ANTITRUST LAWS?

Monopolies have been problems for a long time in the United States. There are numerous industries which have tended toward monopoly, such as: large petroleum companies trying to force independent gas station owners out of business; national supermarket chains driving out the local grocery store; and cement producers fixing cement prices. Monopolistic practices can threaten small businesspeople, consumers or workers. One example which is particularly threatening to Montana is the trend toward concentration and vertical and horizontal integration in the food industries. The market share of the top four beef packing companies was just 25% in 1977 and rose to 74% of the market in 1987. Concentration among packing companies which slaughter sheep and lambs has increased from four firms controlling 58% in 1977 to three firms controlling at least 76% in 1987. Unfair trade practices threaten free enterprise, as well as the economic vitality of our communities which are dependent on the livestock industry.

WHAT HAS THE U.S. SUPREME COURT SAID?

Several recent antitrust cases have been thrown out of court on the basis of questions surrounding who is the right person to take the case.

In 1977 the U.S. Supreme Court held in *Illinois Brick Co. v. Illinois* (431 US 720) that only someone who is directly harmed by an antitrust violation can sue for civil damages under U.S. antitrust laws. Thus, farmers and ranchers, for example, cannot sue meatpacking companies for illegal activities which directly harm only those who buy or sell directly from the meatpacker. The court did not rule that recovery of damages by indirect victims was unconstitutional, but only that U.S. antitrust laws did not clearly allow it. Furthermore, the U.S. Supreme Court found that "indirect purchaser laws" are not preempted by federal law in *California v. ARC America Corp.* 109 S.Ct. 1661 (1989). That is, this law is constitutionally sound.

In *Cargill v. Monfort*, 479 US 104 (1986) the Supreme Court found in Cargill's favor saying the antitrust laws are there to protect competition, not competitors - that is, mergers which increase market share are good for competition, and those who are in competition can't bring a suit. Seeing the handwriting on the wall, Monfort merged with ConAgra three months after the decision. Most recently in *Atlantic Richfield Co. (ARCO) v. USA Petroleum*, 109 L Ed 2d 333 (1990) the Supreme Court held that even assuming ARCO committed an antitrust violation by trying to drive out competitors, the independent retailer of gasoline could not do anything about it because they were competitors.

Effectively, the Supreme Court has limited who can enforce the antitrust laws to people who buy or sell "directly" from the defendant. People who must deal with a corporation that is potentially engaging in monopolistic practices are not very likely to take such a suit when they deal with the company every day. This bill would allow people who the monopolist cannot exert direct retaliation upon to seek enforcement. Essentially, this bill would move the point at which the plaintiff would have to demonstrate injury. Injury would not be a test to get into court, but rather injury would be determined after resolving the question of whether a violation has occcurred and damages must be rewarded. We think the important thing is to make competition fair and reasonable and to stop any illegal activities.

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1-31-91

Northern Plains Resource Council

My name is Jeanne Charter. My husband Steve and I are cow-calf producers from the northern part of Yellowstone County. I am testifying here today in favor of Senate Bill 190 on behalf of the Northern Plains Resource Council. I am a member of the Board of Directors of NPRC.

Independent producers, like us, throughout the state of Montana need a strongly competitive free enterprise pricing system in order to do business. We cannot hope to negotiate a fair price for our products in a centralized, monopolistic industry. SB 190 will give us the ability to require enforcement of anti-trust laws and preserve free martkets to sell in.

SB 190 says that persons both directly and indirectly injured by anti-trust violations can take action. Right now--under the Illinois Brick ruling from the Supreme Court--only feeders can act because they are the packing sector's only direct suppliers. The state has to pass new legislation to grant enforcement rights to anyone else indirectly injured.

We do not believe we can depend on the feeders to act. For one thing, they can and will pass losses back to us basic producers. As one feeder commented to me: "They trim on us; we'll trim on you." For another, feeders will be understandably reluctant to take action against their only outlets.

Our local Musselshell Valley stockgrowers' group heard a very sobering talk from an area feeder Tuesday night. This man is one of the largest feeders in Montana. He told us there is no price competition for his cattle anymore. He sells everything to Conagra, Cargill or IBP, where he used to have many more choices a few years ago. He told us these three packers' bids to him are identical except for the weeks when one or more of the three don't bid at all. He said he felt the packers had dropped the market $2-3 a hundred a few weeks ago by staying off the daily trade and killing only their captive supplies. This independent feeder predicted that he would be out of business in a few years if things don't change and that we basic producers would have to negotiate prices and terms with the Big Three ourselves.

Now, the person who spoke to us is a good man and a brave one, but feeders like him are hardly in a economic position to take on the situation by themselves when they have no choice left in whom they sell their cattle to.

Passage of SB 190 in Montana and similar legislation in other

Ex 13
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producing states will give our industry the inclusive legal recourse we need to work in co-alition and get the big packers and wholesalers to negotiate a fair settlement for all interests. Fifteen other states including South Dakota, Kansas, Wisconsin and Minnesota have already passed similar reforms.

We understand that there is some concern that passage of this bill might simply create a tool for harrassment. We believe there is no danger of that. For one, lawyers do not take damage suits on contingency unless they have a strong case. For another, the courts can throw a case out of court for lack of merit and sanction and fine lawyers for frivolous suits.

Thank you for your attention and we hope you will send SB 190 out of Committee do pass. I have only addressed the state livestock industry's interest in this legislation, but we do see the bill to be as much in the interest of all the other small businesses that are the foundation of Montana's economy. The way it is now, the anti -trust laws are not worth the paper they're written on because so few parties have the right to enforce them.

Exhibit #4
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SB190

SB 190, REVISING UNFAIR TRADE PRACTICES ENFORCEMENT
Senate Judiciary Committee
January 31, 1991, 10:00 a.m.
Comments of Beth Baker, Department of Justice

I want to preface my remarks by stating that we did not participate in the drafting of this legislation, but we do support its principles.

It is no coincidence that Montana citizens are before the Legislature this year requesting tougher antitrust enforcement laws. We are in a period that has been called a renaissance of state antitrust law enforcement, which has been characterized as part of a general resurgence of states in the American federal system. This is evidenced by articles in recent legal publications as well as activities of the National Association of Attorneys General. That Association, in conjunction with the Antitrust Section of the American Bar Association, will be publishing within weeks a new State Antitrust Law Handbook. NAAG's Multistate Antitrust Task Force, which works on multi-state, regional and national antitrust enforcement matters, already has published guidelines for the states dealing with vertical restraints, horizontal mergers, and other antitrust issues.

One reason for the states' emergence in antitrust enforcement is the current federal policy. The former federal antitrust chief, William F. Baxter, admitted that by 1996 most antitrust enforcement will be conducted by the states. The staff of the U.S. Department of Justice Antitrust Division has been reduced by one-half since 1980. In fact, although the volume of merger transactions increased 300% between 1980 and 1986, federal enforcement during that period decreased to one-fifth of its pre-1980 level.

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SB 190

Part of the state antitrust renaissance has taken the form of stronger state legislation in the area of regulation of business practices. In the wake of the Illinois Brick decision, fourteen states now have some form of indirect purchaser statute, and similar legislation was pending in the 1990 sessions of the legislatures of three more states. State indirect purchaser statutes were expressly upheld against a federal preemption challenge in California v. ARC America Corp, a 1989 decision of the U.S. Supreme Court. The Court specifically recognized that monopolies and unfair business practices are in an area traditionally regulated by the states. The Court noted that Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies.

Although there is a great deal of variation in state indirect purchaser statutes, all place emphasis on compensating the actual victims of antitrust violation--those who cannot pass on the unlawful overcharge to others. Senate Bill 190 would give standing to indirect purchasers and to those in competition with the violator to enforce Montana's unfair trade practices laws. Of course, proof of actual injury would be required to recover damages.

Section 30-14-222 in its present form could be interpreted to confer standing on indirect purchasers, but it is not clearly stated. Senate Bill 190, with the proposed amendment, would facilitate private legal actions, while retaining the present authority of the Attorney General to bring enforcement actions.

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SB 190

Private antitrust enforcement actions, which Justice Hugo Black once referred to as the "bulwark of antitrust enforcement", are essential in a state like Montana that does not have a strong commitment of resources for state enforcement. This bill standing alone will not change the role of the Attorney General in antitrust enforcement. At present funding levels, and since the elimination of funding for the Antitrust Bureau in 1981, we have no staff devoted to antitrust enforcement. The Department of Commerce also does not have much staff devoted to consumer protection matters. Without an infusion of resources into a program of state antitrust enforcement, private remedies are critical to the effectiveness of these laws. We support Senate Bill 190 because it will allow those persons injured by unfair trade practices to seek redress in the state courts.

Exhibit #15
31 Jan. 91
SB 190

STATEMENT OF CHEVRON CORPORATION
IN OPPOSITION TO SB 190

There are three basic objections to SB 190:

1. Damages for indirect purchasers. Under federal antitrust legislation, a plaintiff indirectly injured or threatened with injury by reason of an antitrust violation can obtain injunctive relief but cannot obtain damages. The practical effect of the latter is important. If, for example, plaintiffs have been overcharged in purchasing products from one or more members of a price fixing conspiracy, they may seek treble damages from the conspirators. They are the persons "directly" injured by the conspiracy. In contrast, those to whom the direct purchasers resell at prices that may be inflated by the conspiracy are not permitted to sue the conspirators.

In establishing this principle the U. S. Supreme Court reasoned that permitting both directly and indirectly injured parties to sue would (i) expose defendants to multiple liability; would (ii) blunt the effective private enforcement of the antitrust laws by diluting the recovery of those most likely to sue, i.e., those directly injured; and would (iii) unduly burden the courts and the parties with costly and prolonged trials to determine who was injured and by how much. (See Illinois Brick Company v. Illinois 431 U. S. 720 [1977]). SB 190 would reject this sound analysis.

2. Divestiture of offending assets. Permitting a person indirectly injured or threatened with injury to seek an injunction is permitted under federal law because the dangers in respect of damage claims noted by the U. S. Supreme Court are not applicable to claims for injunctive relief. But SB 190 goes farther by providing that "injunctive relief" shall include,

> "an action for divesture [sic] of a portion of a corporation's assets if the court finds that the corporate assets are causing the violation."

Nothing like this is found in federal law nor, so far as we are aware, in any state legislation. Since assets are inanimate and cannot "cause" a violation, it is unsound to treat assets as wrongdoers. In antitrust cases, court orders requiring asset divestitures are primarily used to undo the effects of illegal mergers or acquisitions under Section 7 of the federal Clayton Act and comparable state legislation. Montana does not appear to have such legislation.

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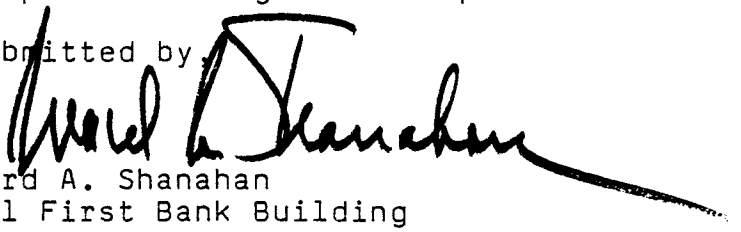
3. Presumptions of injury. The bill's presumptions of injury are inappropriate at best and unintelligible at worst. A few examples will illustrate this. Under subpart (a), the presumption of injury would apply if the plaintiff "purchases directly or indirectly from the violator." But which of the numerous statutory wrongs the "violator" has committed is not specified. A violator of the statute includes a person selling merchandise below cost or giving it away "for the purpose of injuring competitors and destroying competition." Although such conduct may injure the seller's (or donor's) competitors, it can hardly injure anyone who has had the good fortune to acquire merchandise in these circumstances. And even if the violator has conspired to fix the price of one of several products, there would be no injury if plaintiff has purchased only the latter.

Similarly, under subpart (c) there is a presumption that a plaintiff who "deals in the same commodity or service as the violator" is injured. Presumably, such a plaintiff is a competitor of the violator. If the violator and other competitors have, for example, conspired to raise prices, plaintiff as a nonparticipant in the conspiracy can hardly claim to have been injured by higher competitive prices.

Subpart (d) assumes that there is competition between the plaintiff and the violator "to acquire the whole or any part of the stock or other share of capital of another corporation acquired by the violator in violation of this part." But "this part," apparently meaning sections 30-14-201 through 30-14-224, does not contain a provision which, like Section 7 of the Clayton Act, forbids anticompetitive mergers or acquisitions.

Submitted by:



Ward A. Shanahan
301 First Bank Building
P. O. Box 1715
Helena, Montana 59624

Telephone: (406) 442-8460

8925W

SB 190
1-31-91

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 31 day of January, 1991.

Name: Curtis Kinsley

Address: 6860 Applegate
Helena 59601

Telephone Number: 458-5820

Representing whom?
Western Montana Senior Citizen Consulate

Appearing on which proposal?
SB 190

Do you: Support? ✓ Amend?____ Oppose?____

Comments:

During the past 50 years Mega business have been consolidating to the point of near monopoly. They have been pushing smaller business out of the market.

The present threat of the Meat Packing Consolidation in packing and feeding puts the livestock industry in an unfavorable position, at the mercy of the big Two.

If this bill will be a tool to try to get some action on implementing Anti Trust Laws, it should be enacted

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

DATE 31 Jan 91

COMMITTEE ON Senate Judiciary

SB 138 AB 109 SB 190

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppos
DEAN SCHANZ	OCAW	SB138		✓
DICK SCHMIDT	OCAW	SB138		✓
JOHN COCHRAN	OCAW	SB 138		✓
DREW EDWARDS	OCAW	SB138		✓
Julie Holzer	OCAW	SB138		✓
Robert MAXWELL	MT STATE Building trades	SB 138		✓
L H COLVIN	UMWA	SB138		✓
Steve Browning	IBM	SB138	✓	
JAY BEARDEN	USWA LOCAL 72	SB138		✓
Clint Kenney	MLIC	SB 138		✓
RANDY OSTERMILLER	OCAW	SB138		✓
Pat Manuel	CENEX	SB 138	✓	
MARK LANGBORG	AFSCME	SB138		✓
Bob Heiser	U.F.C.W	SB138		✓
CURT LAINGEN	MT MOTOR CARRIERS ASSN	SB 138	✓	
GIL TUTWILER	MT CHAMBER	SB138	✓	
JAMES T. MILLAR	MONT. JOINT RAIL LABOR LEGIS. COUNCIL	SB138		✓
John Mcloe	MFT-MTFSE	SB138		✓
KATHY ANDERSON	MT WOOD PRODUCTS ASSN	SB138	✓	
Jan Cool	Exxon	SB 138	✓	
Laurie Shadoan	Bozeman Chamber	SB138	✓	
RANDEE RODNEY	Boy Scouts	SB 138	✓	
BETH BAKER	DEPT OF JUSTICE	SB190	✓	
DAVID SHANAHAN	AMERICAN CORRECTIONAL	SB 190		✓
[illegible]	MT Petroleum	SB138	✓	
[illegible]	[illegible] Sunlight Mine	SB138	✓	

DATE 31 Jan 91

COMMITTEE ON Senate Judiciary

SB 138

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
Scott Crichton	ACLU Montana	138		✓
Ken Dunham	MT Contractors' Assoc	SB138	X	
Kay Foster	Billings Chamber	138	X	
DAVID MICHELSEN	PATHOLOGY Associates Med Lab	'58	X	
[illegible]	[illegible]	138	X	
Tom Peck	D.E.A.	138	X	
Terry Peterson	Bethday Assoc Mfd Hsg	138	X	
Dick Nash	Washington Const Co.	138	X	
RED DAHLMAN	Better Const. Co.	138	X	
Chase Hibbard	MT Woolgrowers MT Stockgrowers	190	X	
Larry Silvey	Spring Creek Coal Co. MT	138	✓	
Chuck Brooks	MT Retail Assoc.	138	✓	
Steve Turkiewicz	MT Auto Dealer Assn	138	✓	
Ben COPPLE	MNA	138		
LARRY MIDDAGH	PRIVATE BUSINESS	138		✓
Don Judge	MT STATE AFL-CIO	SB138		✓
Terry Minow	MT Ed Leaders MT Ed Staff Employees	SB138		✓
W.T. Oftedal	E.H. Oftedal	SB138	✓	

DATE 1-31-91

COMMITTEE ON Senate Judiciary SB 190

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
James D. Tutwiler	MT Chamber	SB190		X
Nona Hassanein	NPRC	SB190	✓	
Leanne Charter	NPRC	SB 190	✓	
Bill Madday	NPRC	SB 190	✓	