MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on February 14, 1991, at 10:00 a.m.

ROLL CALL

Members Present:
Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (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: Bruce Crippen (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 246

Presentation and Opening Statement by Sponsor:

Senator Dennis Nathe, District 10, advised the Committee tort reform legislation, passed in June 1986, set limits on government liability at $750,000 per claim and $1.5 million per occurrence for economic and non-economic damages for a period of five years. He said this legislation is due to sunset, and the bill would put it into statute. Senator Nathe said there have been no problems with the limits during the past five years.

Proponents' Testimony:

Bret Dahl, Administrator, Tort Claims, Department of Administration (DOA), said he supported the bill which reenacts present limits, effective July 1, 1991.

Mr. Dahl explained that government liability was the topic in 1986, but has been under discussion since 1972. He told the Committee he believes there is no reason for another sunset or expiration date.

Stan Kalyczek, Helena attorney, explained that the Montana Municipal Insurance Authority has been in operation since 1986. He said there are 107 cities and towns in the pool which was established in March, 1986. He told the Committee $6.25 million in bonds were issued to citizens to capitalize the liability program, which has never had a catastrophic claim come near present limits.

Robert McGlenn, Executive Director, Independent Insurance Agents of Montana, requested that the Committee consider changing the limits to make it easier for insurance agents. He said these figures are unique to the insurance industry and require patchwork to meet. Mr. McGlenn stated that the per person limit could be replaced by an occurrence limit. He said he is not asking for an amendment, but that the Committee consider making it easier for the insurance marketplace.

Mike Sherwood, Montana Trial Lawyers Association, said he supported the bill with his proposed amendment (Exhibit # /). He explained that, although this legislation was passed in 1986, it was revised and extended for four years in 1987. Mr. Sherwood said "a similar bill in 1979 was held unconstitutional in 1983, so the 1983 Legislature passed 2-9-107, MCA, which was overruled in 1989."

Mr. Sherwood advised the Committee his amendments would change the limits to $1 million and $2 million, because of inflation. He said he used a "very conservative" five percent cost-of-living increase. Mr. Sherwood asked the Committee to review his amendment, and said it might be better for the insurance companies.

Alec Hansen, Montana League of Cities and Towns, and General Manager, Montana Municipal Insurance Authority, advised the Committee inflationary adjustments were made in 1986 from 1973 levels of $300,000 and $1 million. He said the program was set up with the 1986 limits in mind, and that if these limits were raised the Authority might have to reissue bonds and revise the entire program.

Mr. Hansen told the Committee this program is vital to cities and towns in Montana, and urged them to support the bill.

Opponents' Testimony:

There were no opponents of SB 246.

Questions From Committee Members:

Senator Harp asked Alec Hansen how funding is sitting now. Alec Hansen replied that the liability pool is in very good shape, and that the Authority is able to maintain premium rates

essentially as they were in the beginning of the program. He added that it is going very well.

Senator Harp asked if premiums were considered to be less than those in the private sector. Alec Hansen replied he was not sure, but felt the rates were competitive. He said the program gets more people because of its consistency.

Chairman Pinsoneault asked Mike Sherwood about Alec Hansen's concerns with changing liability limits. Mike Sherwood replied it is more important for review down the road than to up the rates right now.

Senator Towe asked what the court means by "economic interests". Mike Sherwood replied that in White and Post the court said the ability to tax less was not a compelling state interest, but did not say that in Meech. He said that if Senator Towe were looking for language dealing on a historical basis only, it would be the ability to tax less.

Senator Towe asked John Maynard, former Tort Claims Division Administrator, to comment. Mr. Maynard replied that in 1987 when the Legislature was looking at the language in Post, it also looked at the state of the Montana budget which projected a $38 million shortfall in the insurance fund. He said this amount has now been reduced to $9 million in unfunded liability, but the state would argue that in order to pay tort claims it needs another $9 million. He said this money would have to come from something else, and that liability is the "economic interest" under discussion. Mr. Maynard explained that the problem in Post was there was no evidence of a compelling state interest in the legislative language of 1983. He said that if an evidentiary showing can be made on a rational basis, it can be done with legislative records. He commented that he has an actuarial report to submit to the Committee as an argument.

Senator Towe advised the Committee that he and former Senator Turnage (now Chief Justice) helped write this legislation. John Maynard replied he believes the 1983 language is good, but in Post there was no factual record of rational basis.

Senator Towe asked if one could point to the limit of finances in state government. Mr. Maynard replied that one could.

Senator Grosfield asked if the Legislature is really telling the general public is it not sure what correct state policy to have. He commented that if the bill is enacted as it is, it could be subject to periodic legislative review to meet changing levels. Mike Sherwood responded that it is not a matter of what the Legislature is telling the public, but of what the Legislative body is doing. He said there is more friction between the Supreme Court and the Legislature over this one issue, than any others. He stated the problem was there was not fact-finding in the preamble to support the legislation. Mr. Sherwood added that there should

be periodic review of limits, and that if four years from now the economic interest is there, the limits could be changed. He said he did not believe the Supreme Court would see this as a defensive measure, but a responsible measure.

Senator Towe asked Roger McGlenn to comment on Mike Sherwood's proposed amendment to change limits. Mr. McGlenn replied it is not the position of independent agents to tell the Legislature what limits should be. Jackie Terrell, American Insurance Association, replied she would rather not comment.

Closing by Sponsor:

Senator Nathe stated the position of DOA is to terminate the sunset provision and leave limits as they are.

HEARING ON SENATOR SENATE BILL 249

Presentation and Opening Statement by Sponsor:

Senator Paul Svrcek, District 26, said SB 249 would amend the Criminal Justice Information Act in four areas. He advised the Committee that page 4, line 3 makes it clear that federal agencies fall within the statute definition, and are privy to information; and page 6, lines 13-14 clean up confidential criminal justice information language. He said there are also changes on page 9, lines 9-15, and page 10, lines 1-3, and that the Department of Justice (DOJ) would offer amendments.

Proponents' Testimony:

Paul Johnson, Assistant Attorney General, DOJ, advised the Committee he has been working with the Criminal Justice Information Act and found a few flaws which need clearing up. He said he would be available to answer questions relating to the changes.

Opponents' Testimony:

There were no opponents of SB 249.

Questions From Committee Members:

Senator Grosfield asked if the definitions were generic to criminal justice agencies. Paul Johnson replied the definition provided in the bill on page 4 relegates the functions of virtually all peace officers, and some are designated by executive order. He explained that DOJ, as a whole, is a criminal justice agency, and that investigators with the Department of Commerce are also designated as a criminal justice agency.

Chairman Pinsoneault asked if federal presumption were not the case here. Paul Johnson replied that the whole federal system was in place when this legislation was drafted in 1979 to dovetail with

it in order to receive federal enforcement funds. He said Montana legislation thus complements the federal system.

Senator Towe said he devoted four years to this issue in 1977 and that it passed in 1979. He commented he was glad the Department was putting photographs and fingerprints in the bill.

Senator Towe asked what confidential criminal justice does in page 6 of the bill. Paul Johnson replied that the DOJ view is distinctive, and is made clear and confirmed by the language in page 6. He said it is compatible with language on page 2, and that he believes the old language is "surplussage". He said the Department asked what significance was attached to the old language, and no one could answer, but it causes a problem with what pubic information is.

Closing by Sponsor:

Senator Svrcek asked the Committee to give SB 249 favorable consideration.

EXECUTIVE ACTION ON SENATE BILL 249

Motion:

Discussion:

Amendments, Discussion, and Votes:

Senator Svrcek made a motion that the DOJ amendments to SB 249 be approved.

Senator Towe asked what would happen if an individual wants his photograph and/or fingerprints back before he is convicted, and if there would be a time element problem. Paul Johnson replied the bill doesn't specifically address this situation, but it has never been a practical problem.

Senator Svrcek's motion to amend SB 249 carried unanimously.

Recommendation and Vote:

Senator Svrcek made a motion that SB 249 DO PASS AS AMENDED. The motion carried unanimously.

HEARING ON SENATE BILL 271

Presentation and Opening Statement by Sponsor:

Senator Greg Jergeson, said he did not claim to be an expert on the situation addressed in SB 271, which allows a water or sewer supplier to file a lien if the recipient does not make payment. He explained that in the country, neighbors end up paying the bill for those who don't pay.

Proponents' Testimony:

Arnold Peterson, Havre, Secretary-Treasurer North Havre Water District and Montana Rural Water System, read from prepared testimony in support of the bill (Exhibit #2). He said suppliers and operators are trying to assist towns under 1500 with water needs.

Opponents' Testimony:

There were no opponents of SB 271.

Questions From Committee Members:

Senator Grosfield asked what kinds of dollars Mr. Peterson was talking about. Arnold Peterson replied that construction for pipelines costs about $10,000 per member, and that the average is 1.5 miles of pipe for each user. He added that, in the case of a monthly bill, this can be a problem.

Chairman Pinsoneault read a letter from a Helena man who was concerned that such liens would be expanded to apply to property owners and not renters for t.v. cable and other utilities. Mr. Peterson replied he thought the bill would deal with property owners and not landlords.

Senator Towe asked why services were put in the bill, as well as construction. Mr. Peterson replied the District has liability if it shuts water off when there is livestock. He added that there is no provision in the statutes to press for payment.

Senator Towe asked about city water departments. Mr. Peterson replied he didn't believe the bill covered cities. Senator Towe commented that the bill says it does, and asked Mr. Peterson what he is really concerned about. Mr. Peterson replied costs are going up under new regulations, and most water district were built by the FHA, who has the mortgage, and there is no recourse to the individual.

Mr. Peterson stated that the district took applications and did the construction. He said FHA levied only on the water district and not the places themselves. Mr. Peterson offered to leave letters from attorneys for committee review.

Senator Mazurek commented that the bonding system which he represents just shuts off the water supply.

Chairman Pinsoneault asked if documentation were done to identify responsibility when a piece of land is purchased in a water district. Mr. Peterson replied the district can go to court and get a judgment. He said SB 271 is an effort to cover situations which should have already been covered.

Closing by Sponsor:

Senator Jergeson asked the Committee to help resolve this situation.

EXECUTIVE ACTION ON PURCELL CONFIRMATION

Motion:

Discussion:

Senator Towe stated he had concerns with the findings of Judge Harkin, i.e., negligence on the part of Mr. Purcell. He said he believes this is serious from the standpoint of practice and would be subject to reprimand now. Senator Towe stated he would like to ask Mr. Purcell is he acknowledged he made a mistake.

Chairman Pinsoneault commented that was why he advised R. D. Corette, Mr. Purcell's attorney, that he received a distraught phone call from the Merzlak's. Chairman Pinsoneault further commented that he was glad Mr. Corette addressed this in his testimony before the Committee.

Senator Mazurek said he did not believe Judge Purcell could acknowledge his actions before the Committee right now, because the case is still open. He advised the Committee he has been on both sides of Purcell, and has a great deal of respect for him. Senator Mazurek commented that Mr. Purcell obviously made a mistake in this case, "and there but for the grace of God go the rest of us". He added that there has been a whole lot of change in dealing with insurance settlements in the last five or six years.

Senator Svrcek asked Senator Mazurek if Judge Purcell were thorough, and said he wanted thoroughness on the bench. Senator Mazurek replied that Judge Purcell's law firm is one of the top three in Butte. He said Mr. Purcell is incredibly thorough, and that he would place Mr. Purcell high in terms of those on the bench.

Senator Brown asked if the letters sent to the Committee have to be aired, as it seemed to him that discussion and testimony at the hearing would weigh more heavily than the letters.

Senator Towe said he wanted to underscore Chairman Pinsoneault's concerns that each member of the Committee read all the testimony and the Harkin findings, and be prepared to answer questions from the public. Chairman Pinsoneault added that, "although we make mistakes, we are human".

Senator Rye stated he was bothered by the letter from Judge Purcell's secretary, and said he thought Mr. Purcell "danced around Senator Halligan's question". Senator Halligan added that he still has strong concerns with how the Judge treats "the little people", and said he believes there is credibility in what the secretary said in her letter. He said he is trying to focus on judicial temperament.

Chairman Pinsoneault advised the Committee he had growing concerns.

EXECUTIVE ACTION ON HOUSE BILL 24

Motion:

Discussion:

Senator Towe reminded the Committee that Senator Doherty's amendments failed, and that he was proposing amendments to clean up language in the bill. He said Department of Family Services (DFS) language would be deleted from page 2, lines 17-19, and language allowing religion as ethical development and because of natural parent preference, would be inserted on page 2, line 21. He said non-arbitrary language would remain in the bill, and the title would be cleaned up accordingly.

Valencia Lane advised the Committee that the changes in the title and the body of the bill are more substantial and not merely clean up. She said changes to discrimination law factors include things other than age, and marital status.

Ms. Lane told the Committee she is not entirely opposed to the way Senator Towe would amend religion. She stated the bill is an attempt to allow DFS to treat religion the same way as private agencies do, in a non-arbitrary manner. Ms. Lane commented that the Towe amendments say religion can't be considered until it comes into focus when a request is made by the birth mother.

Valencia Lane explained the amendments should narrow the scope of the original draft, and said the Towe amendments are better than no bill at all. She did state that she was concerned with determining best interests of the child on page 2, and asked the Committee to look at the proposed change to page 5, lines 13-16. Senator Towe replied it was not his intent to make this change, and that it would be best to leave this portion of the bill alone.

Amendments, Discussion, and Votes:

Senator Towe made a motion that amendments 2 and 3 of his proposed amendments be approved (Exhibit #3). Senator Grosfield asked Senator Towe to include changing "natural" to "birth" parent in his motion, to which Senator Towe agreed.
The motion carried unanimously.

Recommendation and Vote:

Senator Towe made a motion that HB 24 BE CONCURRED IN AS AMENDED.

Senator Svrcek said he had no problem with private agencies using religion as criteria, but had concerns with "blinking" at religion by DFS. Senator Towe replied he is saying religion can be considered as it relates to the ability to provide for spiritual or religious and ethical development. Chairman Pinsoneault added that he believes this is in the best interest of the child.

Valencia Lane advised the Committee that DFS used sloppy procedures in the case mentioned during the hearing of HB 24 where the adoptive family was Church of God. She said she believes religion is important and should be considered, and that spiritual and ethical development is more important than religion. Ms. Lane stated she did not want this to be a bill allowing discrimination in religion, but to look at the consideration of religion in a non-arbitrary manner.

Senator Towe's motion carried 11-1 with Senator Yellowtail voting no.

ADJOURNMENT

Adjournment At: 12:00 noon

Dick Pinsoneault
Senator Dick Pinsoneault, Chairman

Joann T. Bird
Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991 Date 14 Feb 91

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.

SENATE STANDING COMMITTEE REPORT

February 15, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Bill No. 249 (first reading copy -- white), respectfully report that Senate Bill No. 249 be amended and as so amended do pass:

1. Page 9, lines 11 through 13.
Following: "jurisdiction" on line 11
Strike: remainder of line 11 through "trial" on line 13

2. Page 9, line 15.
Following: "charges"
Insert: "or when the charges did not result in a conviction"

Signed: Richard Pinsoneault
Richard Pinsoneault, Chairman

2-15-91
Amd. Coord.

SB 2-15 12:25
Sec. of Senate

SENATE STANDING COMMITTEE REPORT

February 15, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 24 (third reading copy -- blue), respectfully report that House Bill No. 24 be amended and as so amended be concurred in.

1. Page 2, lines 17 through 19.
Following: "(c)" on line 17
Strike: remainder of line 17 through "AGENCY," on line 19

2. Page 2, line 21.
Following: "development"
Insert: "and as it relates to the express preference of a birth parent to have a child placed with or the express preference of a child to be placed with adoptive parents of a particular religious faith or denomination"

3. Page 3, line 5.
Following: "of"
Strike: "natural"
Insert: "birth"

Signed: Richard Pinsoneault
Richard Pinsoneault, Chairman

RP 2-15-91
Amd. Coord.

2-15 12:25
Sec. of Senate

EX 1
SB246
2-14-91

Testimony of Michael Sherwood
MTLA
Supporting SB 246, with amendments

Section 2-9-108 MCA reads as follows:

2-9-108. (Temporary) **Limitation on governmental liability for damages in tort.** (1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an action or omission of an officer, agent, or employee of that entity in excess of $750,000 for each claim and $1.5 million for each occurrence.

8(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitations specifically waived. (Terminates June 30, 1991--sec. 1, Ch. 228, L. 1987)

This law was enacted in 1986 as Chapter 22 of the Special Laws of June 1986. It was effective July 10, 1986 and terminated June 30, 1987. In 1987 the legislature extended the effective period of the statute to June 30, 1991, by passing Section 1, Chapter 228, Laws of 1987.

2-9-104, a predecessor to this statute had been enacted in 1979. It was held unconstitutional in 1983 as a violation of a fundamental right to "bring an action for a personal injury" in the case of White v. State.

In reaction to that case the 1983 Legislature repealed 2-9-104 and enacted 2-9-107. This time the limitations found in the statute were prefaced with multiple legislative findings to justify the legislation. In 1985 the Supreme Court rejected those findings as not showing a compelling state interest sufficient to denigrate the fundamental right of "full legal redress" in the case of Pfost v. State.

White and Pfost were overruled by the Montana Supreme Court in 1989. The court reversed it's prior holdings that such legislation denigrated a fundamental right and therefore required a compelling state interest. Instead, the court required only that the legislation's disparate treatment of similar claims be "rationally related" to a legitimate state interest. That interest was the promotion of Montana's economic interests. This rationale is found in several decisions, including Meech v. Hillhaven West, Inc..

In order to insure that 2-9-108 is not voided by the Supreme court in the future, the legislature should do two things:

1. Continue to provide for periodic review of these

Exhibit
2-14-91
SB 246

limitations in order to insure that the limits bear a rational relation to the promotion of Montana's economic interests. For that reason, I propose that rather than remove the termination date for the limitation on damages, this body extend that termination date for an additional two years. I have attached a proposed amendment for that purpose.

2. Take the opportunity to review the present limits to see if they are rational. If the limits were rational in 1986, some five years ago, then perhaps they only continue to be so it adjusted by a minimal cost of living increase. If a 5% per annum increase is applied the figures should be adjusted by a factor of 1.28. In other words the figures should be adjusted to $960,000 for each claim and $1.82 million for each occurrence.

One other factor demands review. Insurance companies don't issue policies on a regular basis for such odd numbers, either the current numbers of those resulting from a cost of living increase. More typically insurance companies issue policies for round numbers, e.g 1 million, 2 million, etc. Even the self insured local governments are obtaining excess insurance coverage above certain round numbers.

For the foregoing reasons, I ask the committee to amend the current language to adjust the caps to $1 per claim and $2 million for each occurrence.

Exhibit
2-14-91
SB 246

Proposed amendments of Michael Sherwood, MTLA

At Line 5, after "ACT",

STRIKE: "REMOVING", and
INSERT: "EXTENDING"

At Line 6, after "FOR",

INSERT: "AND RAISING"

At Line 16, after "~~date.~~",

INSERT: "TERMINATION DATE."

At line 19, after "~~1991.~~",

INSERT: "SECTIONS 1 AND 1 OF THIS ACT TERMINATE ON JUNE 30, 1993."

At line 20,

INSERT: "**Section 2.** Section 2-9-108, MCA, is amended to read:

2-9-108. (Temporary) **Limitation on governmental liability for damages in tort.** (1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a result of an action or omission of an officer, agent, or employee of that entity in excess of $1 million ~~$750,000~~ for each claim and ~~$1.5~~ $2 million for each occurrence.

8(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitations specifically waived.

At line 20, after "**Section**",

STRIKE: **2**
INSERT: **3**

Ex. 1a
2-14-91
SB 246

WITNESS STATEMENT

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

Dated this 11 day of February, 1991.

Name: Ruth Daly

Address: 542 Toole Court

Telephone Number: 458-6247

Representing whom?

Tort Claims Division

Appearing on which proposal?

SB

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

Comments:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

Ex. 1a
2-14-91
SB 246

February 14, 1991

TESTIMONY IN SUPPORT OF H.B. 246

AN ACT REMOVING THE TERMINATION DATE
FOR LIMITATIONS ON GOVERNMENTAL LIABILITY
FOR DAMAGES IN TORT ACTIONS

Mr. Chairman, Members of the Committee, My name is Brett Dahl. I'm the Administrator of the Tort Claims Division, Department of Administration.

We support H.B. 246, which proposes to remove the termination date of June 30, 1991 and to re-enact the present liability limits ($750,000 per claim and $1,500,000 per occurrence) which plaintiffs may recover from the state for damages in tort actions effective July 1, 1991.

I would like to provide a brief historical perspective. Limits on governmental liability have been the topic of much discussion in the Legislature and at the Supreme Court since 1972, when the State of Montana lost its sovereign immunity and was no longer immune from lawsuit.

The limits have changed over the years to include recovery for non-economic damages. In addition, the limits have been modified by the Supreme Court and the Legislature where a compelling interest existed, or to provide full legal redress to plaintiffs seeking economic or non-economic damages from the state.

Most recently, in 1986, the limits were set at $750,000/$1,500,000 for both economic and non-economic damages. The liability limits in effect, were given a 5 year trial period with a sunset date of June 1991 at which point the limits expire.

We respectfully request re-enactment of the present limits effective July 1, 1991. The present limits have been in effect for the past 5 years and have never been challenged by plaintiffs.

We also submit that there is no need to establish another sunset or expiration date at this point in time. If changes to the limits are necessary, legislation may be introduced by interested parties to that effect. Additionally, the limits are constantly being reviewed by the Supreme Court who will modify the present limits if they feel that there is a compelling reason to do so.

THANK YOU FOR YOUR CONSIDERATION.

Exhibit C
14 Feb 91

SB 271

I am Arnold Peterson
I live at 1220 - 5th Street
Havre, MT 59405

I have been Secretary-Treasurer of North Havre County Water District since its beginning. I have also been a member of the Legislative Committee of Montana Rural Water Systems for several years. Senate Bill 271 was introduced at the request of Montana Rural Water Systems. Rural Water Systems have been troubled for some time by the problem of collecting construction costs and service fees from individuals who for various reasons decided not to participate in the payment of construction and services.

Water Districts were given the authority to levy taxes against real property located within the District, on a district wide basis. This is not practical since it makes the whole District liable for the individuals who are delinquent. Montana Statutes do not provide that Water District Assessments become a lien against real estate. There also is nothing in the law that allows Water Districts to file liens similar to mechanics liens against property as a result of delinquent payments.

After consulation with several legal firms in the state, it appears to us that Senate Bill 271 is the most practical solution to the problem for Rural Water Districts & Associations.

There would no doubt have been several other Districts appearing to urge passage of this bill but our state association is presently holding its Annual Meeting and Training session in Great Falls this morning, 14 Feb 91.

Ex. 29 DS 271
2-14-91

GARLINGTON, LOHN & ROBINSON

STEVEN S. CAREY
GARY B. CHUMRAU
LAWRENCE F. DALY
E. CRAIG DAUE
CANDACE C. FETSCHER
GEORGE D. GOODRICH
GARY L. GRAHAM
GREGORY L. HANSON
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ROBERT E. SHERIDAN
W. DENNIS STARKEL
WILLIAM T. WAGNER
LEO S. WARD
KELLY M. WILLS

J.C. GARLINGTON
R.H. "TY" ROBINSON
OF COUNSEL

September 14, 1988

Doreen Culver
Seeley Lake-Missoula County Water District
P.O. Box 503
Seeley Lake, MT 59868

RE: Liens

Dear Doreen:

The District has again raised a question concerning the legality of filing a lien against real property for nonpayment of debt and availability charges. On January 14, 1983, we sent you an opinion letter indicating that Montana law does not provide for the filing of a lien against real estate for delinquent payments. More recently we confirmed that opinion in a letter dated March 28, 1988. It continues to be our position that Montana law simply does not provide a means by which the District may file such a lien, absent appropriate restrictive covenants or mortgage documents referred to in our earlier letters. The debt is an individual obligation of the property owners and you have the right to pursue the individual by means of a collection action. Further, although it is not a practical remedy, you have the right to levy a district-wide tax.

In the past, I have recommended and continue to recommend that you and other water districts lobby for a legislative change. Perhaps the Legislature could be convinced to pass a new statute entitling water districts to file a lien in the event of nonpayment. This is obviously a much more practical remedy than a tax levy and would seem reasonable in light of the fact that the charges are directly related to the ownership of the real property. Perhaps contact with one of the Missoula legislators such as Fred VanValkenburg or Mike Hallign would be the best approach. Perhaps they could be convinced to sponsor a bill.

I have advised you in the past that there is nothing in the law that specifically prohibits you from filing a lien. However, since the law does allow liens to be filed under certain circumstances (such as construction liens) it is quite clear that the filing of such a lien was not contemplated by the Legislature. If you decide to file liens, you should be advised that it cannot be done without some risk. It would constitute a cloud on the title to the property. Property owners at the very least could require you to remove the lien and in theory could seek any damages they incur. For example, the lien could delay or prevent a sale of the property. Further, such a lien could be a default of an underlying security document such as a mortgage and could cause default notices and/or an unnecessary foreclosure. This could conceivably damage the property owner.

As a practical matter, the damages would generally be minimal and the amount of your liens will generally be rather small. Under those circumstances there is a good chance the filing of the lien would cause no problems and would afford you a better opportunity of getting paid. However, you should be well aware of the risk and the problems that the improper filing of a lien can cause. Because of that risk, it would not be appropriate for our office to recommend the filing of a lien.

Nonetheless, you requested that we send copies of some lien documents for your review. In this regard, I am enclosing herewith a copy of a Mechanics Lien (under the old law) and a copy of a Construction Lien (under the new law) which are filed in connection with nonpayment of labor and materials on a construction project. I am also enclosing a Lien which has been used by a local homeowners association for nonpayment of association assessments. This may be closer to a form you would adopt for your purposes.

Again, although we cannot recommend that you file such a lien, if you do so, you may use these forms as a guideline. A new form for your purposes should be prepared for signature by the Manager or President of the Board. The signature would have to be notarized so it is recordable in form. If you would like us to review a form you have prepared, please let us know.

Ex. 2a
SB 271
2-14-91

In summary, it seems to us that the best way to proceed would be to have the Legislature reconsider its position. Further, you should make every effort to keep the amount of delinquencies at a minimum by pursuing individuals more quickly when they have failed to pay. In this regard, if you file a collection action against individual lot owners, any eventual judgment would then become a lien against the real property owned by them. Under Montana law a judgment automatically constitutes a lien against real property located in the county where the judgment is obtained. Although this process may be more time consuming and expensive, it is clearly allowed under Montana law.

Please let us know if there is anything else we can do.

Very truly yours,

GARLINGTON, LOHN & ROBINSON

By Gary B. Chumrau
Gary B. Chumrau

GBC:la
enclosures

Exhibit # 2a
2/14/91 SB 271

January 14, 1983

Jim Smith, President
Seeley Lake Missoula County
Water District
Post Office Box 503
Seeley Lake, MT 59868

RE: Security for Delinquent Payments

Dear Jim:

You have asked for our opinion concerning the Water District's remedies for collection of delinquent payments. This includes delinquent water use payments as well as delinquent debt and availability payments. You have asked if delinquent payments are a lien against the real property owned by the water user. You would also like to know the effect of the filing of a bankruptcy petition on such delinquent payments.

In reaching our opinion we have discussed this matter with a number of people. I talked with the managers of two title companies, the Bankruptcy Trustee in Missoula, and Mr. Ron Smith, the attorney for the Montana Water Association. I have also reviewed the relevant Montana statutes and the Bankruptcy Code.

Montana law gives a water district broad general powers. The districts are also given broad power to establish charges for water services. Section 7-13-2301, MCA. You may fix rates or charges necessary to pay for water service, operating expenses, repairs, depreciation, interest on bonded indebtedness and provide a sinking or other fund for the payment of the principal debt. The individual land owners benefitted by the services provided by the water district are required to pay your fees and charges. Any person or entity using water and owning property within your district would be personally or individually liable for payments.

COPY

The next question becomes whether the lot or real estate itself can be burdened with the water district obligations. As you know, such things as real estate taxes, SIDs and other assessments are by law a lien against and attach to the real property. In this manner any purchasers or subsequent owners of real property can be burdened with previous unpaid obligations. I can find no statute or other support for the proposition that water district obligations become a lien against the real property benefited. The Montana statutes do not provide that water district assessments automatically become a lien against real property. In addition, I have found nothing to allow us to file a lien document, similar to a mechanic's lien, against the property as a result of delinquent payments.

For protection, water districts were given the authority to levy taxes against the real property located in the district to meet bond obligations and other expenses of the district. This is a district wide tax levy and must be approved and levied by the county commissioners. This is not a very practical remedy when only a few of the customers are behind in payments.

A lien may be created by agreement. For example, the property within the water district may be subject to a set of restrictive covenants. The covenants may create a homeowners association and provide that the homeowners association may file liens against the property for non-payment of homeowners dues or water use charges. It is my understanding that the entire water district is not subject to covenants. However, you may wish to review the covenants in effect and see if you or the homeowners association are given the right to file a lien for non-payment of water use charges. If so, this could constitute a lien against the property.

You could also prepare and record a lien document for non-payment of water district charges. This would at least alert title companies that the owner of the property may be in arrears on payments. However, since there is no statutory authority for the filing of such a lien, you may run the risk that such a lien document is improper and a property owner could force you to remove the lien and seek damages.

Another remedy you have used in the past is termination of water service. This remedy only helps solve the problem with regard to future water use charges. It would not help you collect delinquent water use payments or debt and availability charges.

In my discussion with Ron Smith he indicated that most of the water districts with which he is familiar have borrowed money from the FMHA to initially create or expand the district. The FMHA, in most cases, has filed a mortgage on the real property located within the district to secure the debt obligation. These mortgages, by their terms, state that the real property will be used to secure each lot's pro-rata share of the bonded indebtedness and other district expenses. Since this is a recorded document and the owners of the property take subject to its terms, it is likely that the real property itself is subject to the district charges. Unfortunately our law office did not do the initial work for the Seeley Lake Missoula County Water District. We are not sure if the FMHA filed mortgages in connection with your loans. I reviewed the files we have in our office and did not find copies of any such mortgages. It appears to me from the documentation in the files that the FMHA relied your district's district revenue and the taxing authority as security. Please review your files in detail to determine if the FMHA has in fact recorded mortgages subjecting the real property to the payment of the district obligations.

Absent appropriate restrictive covenants or such a mortgage document, Ron Smith agrees that we have no basis to claim that the water district charges constitute a lien against the real property. He also agrees that it may be a good idea to initiate a lobbying effort in Helena to pass new legislation in this regard. I'm sure the Legislature would be willing to consider protective legislation. For example, they could pass a statute that automatically gives a district, after appropriate notice and hearing, a lien against the real property for non-payment of water district charges. In the alternative they could provide a new lien statute, similar to the mechanic's lien statute, that gives a district the right to file a lien under the appropriate circumstances. You may wish to talk to Ron Smith and the State Water Association about this possiblity.

As far as bankruptcy is concerned, it is my position that any individual lot owner may discharge a water district obligation in bankruptcy. This should apply only to "pre-petition" obligations. In other words, your customers should be able to discharge and avoid payment of any water use and debt and availability charges incurred prior to the date of the filing of the bankruptcy petition. For example, if on the date of filing they are delinquent for two months of water use charges and debt and availability charges, those amounts could be discharged.

Any obligations incurred after the date of filing are "post-petition" and the individual should still be obligated to you and you should be able to collect such charges. As far as collection of pre-petition obligations are concerned, I suggest that you file the necessary proof of claim with the bankruptcy court. You will receive your pro-rata share as an unsecured creditor.

I should also mention Section 366 of the Bankruptcy Code. This section concerns termination of utility services. This would be applicable only to our water use charges. A copy of the section is enclosed for your review. A utility may not discontinue service simply because a bankruptcy petition has been filed. You may discontinue water service if, within twenty days after the date of the filing of the petition, the debtor or the bankruptcy trustee has not furnished you "adequate assurance" of future payments. Your customer must provide a deposit or some other form of security that he will pay all his future use charges. This section of law will make it difficult for a bankrupt to incur water use charges without providing assurance that you will be paid. This section does not provide protection for past due use payments.

The best protection we have is that the water district charges constitute individual obligations of the lot owners. Most of the time the individuals realize the charges are associated with ownership of the real property. For that reason, most individuals can be convinced to pay. In addition, most individuals and title companies think that the charges are associated with the real property and the district will be paid out of real estate closing proceeds when the property is sold.

Despite the fact that the law does not give us as many protections as we would like, we should continue to take the position that the obligations are not only individual, but also linked to the real property. This should work until someone objects and the issues are raised. In the meantime, we should consider new legislation or restrictive covenants that give us a lien against the real property.

I apologize for the length of this opinion letter. This matter is much more complicated than we initially anticipated. If you

find any FMHA mortgages or other recorded documents, please let me know. That may solve our problem.

Very truly yours,

GARLINGTON, LOHN & ROBINSON

By
Gary B. Chumrau

GBC:djo
Enclosure

Exh. 3
2-14-91
HB 24

Amendments to House Bill No. 24
Third Reading Copy (Blue)

For the Committee on Judiciary

Prepared by Valencia Lane
February 15, 1991

1. Page 2, lines 17 through 19.
Following: "(c)" on line 17
Strike: remainder of line 17 through "AGENCY," on line 19

2. Page 2, line 21.
Following: "development"
Insert: "and as it relates to the express preference of a birth parent to have a child placed with or the express preference of a child to be placed with adoptive parents of a particular religious faith or denomination"

3. Page 3, line 5.
Following: "of"
Strike: "natural"
Insert: "birth"

Exhibit #4
14 Feb 91
SB 249

Amendments to Senate Bill 249
Introduction Copy

Prepared by Peter Funk
Department of Justice
February 14, 1991

1. Page 9, line 11 through line 13.
Following: "jurisdiction" on line 11
Strike: remainder of line 11 through "trial" on line 13.

2. Page 9, line 15.
Following: "charges"
Insert: "or the charges did not result in a conviction".

Feb. 13, 1991

Confirmation Hearing - Purcell 2-14-91

HONORABLE DICK PINSONEAULT,

Dear Senator,

We understand that Mr. James Purcell is to appear before a 12-member Senate Committee this week for confirmation of his becoming a judge in Butte, Mont. We also understand you have received several letters opposing his confirmation. I want you to know we are among a long line of people opposing his confirmation, and had we known our letters opposing him, would have made a difference, we would have sent them long ago.

We sat in on the week-long trial of our son and daughter-in-law's lawsuit, for malpractice against Mr. Purcell and as a layman it was very hard to believe that Mr. Purcell considered himself a lawyer. He never kept important records and couldn't remember important facts and we wonder now he could ever rule as a Judge on important matters, especially involving people's lives.

My son and daughter-in-law have suffered terribly from his malpractice, which Judge Harkins, in Missoula, ruled in favor of, and we certainly wouldn't want anyone else to go through what they've gone through, or what they might go through in the future.

I know that Mr. Purcell has not represented his clients, from first-hand knowledge and from talking to his former clients. These clients, including ourselves, just dropped him as their lawyer, but our Son went through with a lawsuit, after being advised from another Butte lawyer, that Mr. Purcell misrepresented them. I wish other clients had the nerve to have sued him as our Son did. How else would the public know of his mis-representations? These facts should have been made public long ago, since this has been Mr. Purcell's practice for years.

As ever,

Mr. & Mrs. Joe Merzlak

Mr. & Mrs. Joe Merzlak

Purcell Confirmation Hearing 2-14-91

Law Offices of
ROBERT B. GOULD

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Robert B. Gould

Theodore D. Silva
Of Counsel

February 13, 1991

TRANSMITTED VIA FACSIMILE ONLY

Honorable Richard Pinsoneault
Montana State Senate
Helena, MT

Re: James E. Purcell
Merzlak v. Purcell
Fourth Judicial District Court Cause No. 69904/67

Dear Senator Pinsoneault:

It was very gracious of you to return my call on Wednesday morning, February 13, 1991.

As promised, I am faxing to you herewith a copy Judge Douglas Harkin's oral decision in this case, consisting of 15 pages. We have filed a motion in front of Judge Harkin to amend his findings to increase damages and for an award of punitive damages. As I write, we have not yet received a decision on this matter.

It seems to me that in a sense of fairness and balance that the Montana State Senate should hear the other side of the story, i.e., from Mr. and/or Mrs. Merzlak. I am sure that they would be happy to testify by long distance telephone call. Their phone number is (206) 742-2019.

I am currently in trial, but would be happy to provide any additional information or material that you might need.

Thank you for the opportunity to address this very important matter.

Respectfully,

Robert B. Gould

RBG/jk
Enclosure
cc: (w/o enc.)
James M. Driscoll, Esq.
Mr. and Mrs. Merzlak

Purcell Confirmation Hearing 2-14-91

Douglas G. Harkin, District Judge
Department 4
Fourth Judicial District
Missoula County Courthouse
(406) 523-4774

FILED
BY Catherine Schwend
DEPUTY
'90 DEC 7 PM 4 41
CLERK OF DISTRICT COURT
KATHLEEN D. BREUER

MONTANA FOURTH JUDICIAL DISTRICT COURT, MISSOULA COUNTY

JOE R. MERZLAK and JANENE L. MERZLAK, Plaintiffs, vs. JAMES E. PURCELL and HENNINGSEN AND PURCELL, a Montana professional services corporation, Defendants.	Cause No. 69904/67 MEMORANDUM, FINDINGS OF FACT & CONCLUSIONS OF LAW

This matter came on before the undersigned judge of tha above-entitled Court, sitting without a jury. The case commenced on Tuesday, October 30, 1990 and was submitted to the Court on Friday, November 2, 1990. Plaintiffs were represented by their attorneys, Robert B. Gould, admitted pro hac vice, and Montana counsel, James M. Driscoll. Defendants were represented by their attorney, R.D. Corette. The following witnesses were called during the course of the trial: Plaintiffs; Defendant James E. Purcell; Joseph Merzlak, Sr.; Richard DeJana, Kalispell attorney expert witness; Mr. Larry Elison, Missoula attorney and law professor expert witness; and Scott Van Linder, M.D., expert witness who testified via long distance telephone. Defendants called James E. Purcell and Mark

DATE 2-14-91

COMMITTEE ON Judiciary

VISITORS' REGISTER SB271 S.B.249 SB246

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Conrad Peterson	Mont Rural Water Syst	271	✓	
STAN KALAZYC	MONTANA MUNICIPAL INS AUTH	246	✓	
Butt Ohs	Tort Claims Division	246	✓	
Roger McGlenn	INDEPENDENT INS. AGENTS ASSOC OF MT	246	✓	
John Maynard	Self	246	✓	
Michael S Halwood	MTCA	246	for amendments	