MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on March 25, 1991, at 10:05 a.m.

ROLL CALL

Members Present:

Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
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: none

Staff Present: Valencia Lane (Legislative Council).

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

Announcements/Discussion: none

HEARING ON HOUSE BILL 668

Presentation and Opening Statement by Sponsor:

Representative Paula Darko, District 2, said a similar version of HB 668 did not pass last session. She explained that the bill would allow suspension of a driver's license for a person under 18 years of age convicted of multiple offenses of possession of an intoxicating substance, and that currently a judge can only assess a $50 fine.

Representative Darko advised the Committee that HB 668 follows with the discipline used in teaching, i.e. logical, progressive consequences. She said the bill came through the House with a strong vote, and that suspension of a license is optional for justices of the peace. Representative Darko urged the Committee to support HB 668.

Proponents' Testimony:

Patricia Bradley, Montana Magistrates, read from a short statement in support in support of HB 668.

Opponents' Testimony:

There were no opponents of the bill.

Questions From Committee Members:

Senator Towe asked if a license is suspended for 90 days or less for a first offense. Representative Darko replied that would be correct.

Closing by Sponsor:

Representative Darko advised the Committee that language was changed from "revoked" to "suspension" in order to have an official record of the suspension.

EXECUTIVE ACTION ON HOUSE BILL 668

Motion:

Senator Towe made a motion that HB 668 BE CONCURRED IN.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

The motion made by Senator Towe carried unanimously.

HEARING ON HOUSE BILL 559

Presentation and Opening Statement by Sponsor:

Representative Russell Fagg, District 89, said HB 559 was requested by the Department of Justice. He explained that the bill addresses DUI with regard to operation of planes and boats, as well as automobiles. Representative Fagg advised the Committee that an important part of the bill was stripped out in the House by Representative Measure, concerning testing for drugs by an arresting officer if he or she suspects drug use. He asked that this language be reinserted in the bill (Exhibit #1).

Representative Fagg stated that officers need to be able to test people for drugs, because they are able to arrest them for driving under the influence of drugs.

Proponents' Testimony:

Peter Funk, Office of the Attorney General, said the Department of Justice (DOJ), felt the language needed to be cleaned up, that DUI statutes needed to be consistent. He said another issue changes language from "presumptive" to "inference", and that the Department recognizes this is a Legislative decision. Mr. Funk stated it is a crime to drive under the influence of drugs, but tests are provided only for alcohol right now.

Mr. Funk advised the Committee that implied consent is in 64-108-402, MCA (Section 2 of the bill). He explained that testing is limited to two tests (page 4). Peter Funk proposed an amendment on page 7, line 17 (Exhibit #2). He said initial tests show only "metabolite", and not the actual presence of drugs because marijuana can remain in the blood for 30 days or more.

Mr. Funk stated he believes law enforcement needs some mechanism for developing the level of evidence. He explained that people cannot be convicted solely on the results of blood tests, and that no tests can occur under the implied consent statute until the arresting officer has made the decision to make an arrest (61-8-402, MCA).

Mr. Funk explained that the bill asks for the right to test a fairly small segment of drivers. He said "narcotic" on page 1 was changed to "dangerous" to mesh with the criminal system. Mr. Funk further stated that concentration of alcohol "in the blood" was changed to "in the person" on page 2, line 15 (62-8-407, MCA).

Mr. Funk further advised the Committee that the inference change is at the bottom of page 2, line 19 and the top of page 3, through line 6, concerning producing every element of offense beyond a reasonable doubt. He told the Committee that Leverett, (October or November 1990), was a negligent homicide prosecution, based on this presumption. Mr. Funk explained that DOJ now believes this is a dead issue. He urged the Committee to make this change in presumption language, and said that statute is unconstitutional right now.

Mr. Funk continued, and said the bottom of page 5 and the top of page 6 clarify that non-residents involved in implied consent tests would be handled the same as for a Montana resident. He stated that page 9, line 6 currently says that persons placed under arrest for DUI have the right to their own test. Mr. Funk recommended changing the language from "person tested" to "person under arrest".

In conclusion, Mr. Funk asked the Committee to strike Section 10, the implied consent provision for motor vehicles, as this is being done through HB 572.

John Connor, Montana County Attorneys, and County Prosecutor Services, Department of Justice, advised the Committee that he works with county prosecutors in serving their particular interests in changing language in statute. He said prosecutors like to look to the statutes, and that failure to change "presumptive" to "inference" would be devastating to validity, as it is not constitutional as it now stands.

Phil Lively, Director, Breath Alcohol Program, Division of Forensic Science, DOJ, Missoula, said he supports amending the bill concerning drug testing. He explained that officer training for alcohol has been expanded from 6 hours to 32 hours over the past few years. He said every arrest would not be tested for drugs, and that drugs testing is a very difficult area to develop evidence for (Exhibit #3).

Mr. Lively told the Committee that frequently a law enforcement office will see the need for further testing for performance, but is prevented from doing so because drug testing is not allowed. He said paraphernalia doesn't necessarily lead to a firm correlation of drug use.

Phil Lively further advised the Committee that Jim Hutchison, Senior Toxicologist for the Crime Lab, found that 26 percent of alcohol sample also showed drugs, and 33 percent of this group showed more than one drug "on board". He said the Lab pulled 100 random blood samples for alcohol and found 30 percent of them to be positive for marijuana. He said this indicates that people drive fairly frequently under the influence of drugs.

Mr. Lively further stated that alcohol is unique in the ability to establish a blood alcohol level to impairment, but this is not possible with other drugs. He said he got a verbal agreement from the National Highway Safety Council to have drug recognition and evaluation training, and that Montana has been turned down twice before for this training.

In conclusion, Mr. Lively stated that drug recognition and evaluation training can help officers to immediately make identifications and then help toxicologists. He urged the Committee to consider drug and multiple testing.

Opponents' Testimony:

There were no opponents of the bill.

Questions From Committee Members:

Senator Pinsoneault asked what happens if an arrestee says he wants his own test, and how a law enforcement office would handle

this. John Connor replied that prosecution must look at the overall picture to get the job done, and said the arrestee is entitled to refuse testing or get his own test. He commented that it could present some problems. Mr. Connor said that if the test is intended to be used in a trial, then prosecutors are entitled to testing information. He explained that, otherwise, the state is not entitled to get the results of a test.

Senator Pinsoneault asked what happens if the arrestee agrees to a test. John Connor replied that if it is exculpatory, the prosecutor would want this information.

Senator Towe asked about language on page 4, concerning probable cause for drugs. Peter Funk replied that, in his opinion, once an officer determines there is probable cause to place someone under arrest, that officer has the right to test for blood alcohol level and drugs.

Senator Towe asked if this would allow fairly routine drug testing. Peter Funk replied that, in terms of a legal challenge, he had no problems with the bill as it is drafted now. He further stated that he had no problem with inserting probably cause language. Peter Funk advised Senator Towe that existing language says "one test".

Senator Towe asked what a drug test identifies. Peter Funk replied that the first test makes identification, and the second test is confirmatory. Mr. Lively further advised Senator Towe that if a blood sample is taken, the lab can do general screening and quantitate to the level of a drug on the second test. He explained that it is more difficult if the lab is looking for alcohol, as they would need more blood. Mr. Lively commented that it would be best to do a breathalyzer first.

Senator Towe asked why blood tests would be used rather than urine tests. Mr. Lively replied that if it is psychoactive, it is in the blood, but this is not so for urine. He explained that marijuana would not be in blood one week after use.

Senator Towe asked what happens if a person is only given a citation and is not arrested. Peter Funk replied that this would not be a problem, but all DUIs are now placed under arrest.

Senator Svrcek asked about amendment language, "other competent evidence" on page 3, lines 7-10. Peter Funk replied that is in existing DUI statute. He said this means to defer to the judge handling this matter, and is saying the prosecutor must have evidence beyond the drug test that the judge is willing to admit, such as a field sobriety test.

Chairman Pinsoneault advised Senator Svrcek that there is always a video for "other competent evidence".

Senator Svrcek asked about the competency of testing labs, and if they would be NIDA-certified. Jim Hutchison, replied that NIDA-certified labs were established as protection for pre-employment screening, as these labs may employ people who may not have proper training or education. He said the Forensic lab deals with criminal information, and requires a minimum of a B.S. or an M.S., and that employees are trained, forensically, by colleagues. Mr. Hutchison stated there is no specific certification, but the lab is certified by the Association of Medical Examiners and the Board of Toxicologists. He commented the lab would pass a NIDA inspection.

Senator Svrcek asked if an officer has sanction to search a vehicle if he or she suspects the use of drugs. Mr. Lively replied he is not familiar with search and seizure, but officers do ask to search vehicles, are many times given permission, and do find drugs. He explained that open view is also available to law enforcement officers.

Senator Svrcek asked about Mr. Lively's "multiple" testing statement. Mr. Lively replied that science may mean 100 analyses of a sample and law may mean a sample. He commented that maybe language needs to be changed to "a sample or samples".

Senator Svrcek asked if these blood samples become the property of the state, if they are labeled by person, and if the defendants are aware of random testing on those samples. Mr. Lively replied this was done as in investigative process without thought of prosecution, and was done randomly. He said there are no names or numbers on the samples.

Peter Funk commented that if law enforcement can't develop a procedure to eliminate multiple testing without harassment, they shouldn't have the right to test.

Closing by Sponsor:

Representative Fagg asked the Committee to remember that the person doesn't have to take the tests, but would lose his or her drivers' license. He asked the Committee to pass the bill with the proposed amendment.

HEARING ON HOUSE BILL 572

Presentation and Opening Statement by Sponsor:

Representative Jim Rice, District 43, said he was presenting the bill with some reluctance, as it is rather oppressive-looking, but the state needs to comply with federal statutes or it will lose between 5 and 10 percent of federal dollars. He explained that HB 572 raises the penalty for a second-offense commercial DUI from 10 years to life suspension.

Proponents' Testimony:

Peter Funk, Office of the Attorney General, said the bill is based on the 1986 federal Motor Carrier Act, and reflects a very harsh view by the federal government (Exhibits #4 and #5).

Opponents' Testimony:

There were no opponents of HB 572.

Questions From Committee Members:

Chairman Pinsoneault asked what the definition of "hazardous material" is in the law. Peter Funk replied the current definition is in the code of federal regulations, and that a long list of substantial materials fall into this category.

Chairman Pinsoneault asked if the driver knows he is carrying hazardous materials. Peter Funk replied that a separate drivers' license, and tests are required to haul hazardous materials. He said specific marking, called "placarding" is also required.

Senator Harp asked if this bill applies to everything over 26,000 GVW. Peter Funk replied it does.

Senator Harp said he believes definition of "hazardous material" is needed in the bill. He asked if the federal requirement is a three-year suspension for a first offense. Peter Funk replied it is.

Senator Towe said the bill really goes beyond what is necessary to comply with federal code. Peter Funk referred to page 4, line 20, and said Montana tried to guess what federal sanctions would be and guessed wrong. He said the federal government said "life" instead of ten years.

Closing by Sponsor:

Representative Rice advised the Committee that the commercial truckers proposed an amendment which was adopted in the House.

HEARING ON HOUSE BILL 571

Presentation and Opening Statement by Sponsor:

Representative Jim Rice, District 43, said HB 571 is a technical bill, and that Sections 1 and 2 address habitual traffic offenders. He explained that the bill makes sure other sections of code are referred to allowing a provisionary license prior to termination of the three-year suspension period.

Representative Rice stated that Section 3 changes the penalty, for those arrests for driving again while their license is suspended for habitual traffic offenses, of an additional year.

Proponents' Testimony:

Peter Funk, Office of the Attorney General, Said language was inserted in Section 3 (top of page 3), to tack on a light period at the end of the suspension period if a driver is caught driver during that suspension period. He said habitual traffic offenders now have 30 conviction points within three years, but the suspension period is not extended. He said DUI is 10 points.

Opponents' Testimony:

There were no opponents of the bill.

Questions From Committee Members:

Senator Svrcek asked why the drafters opted for "shall" and not "may" at the top of page 3 of the bill. Peter Funk replied there is a difference between the sentencing (judicial) process, and the suspension (civil) process. He stated that almost all of the drivers' licenses suspended and revoked are upon receipt of notice of conviction.

Chairman Pinsoneault said this causes a problem for defense counsel, if part of that person's job involves operating a motor vehicle.

Closing by Sponsor:

Representative Rice made no closing comments.

HEARING ON HOUSE BILL 573

Presentation and Opening Statement by Sponsor:

Representative Jim Rice, District 43, said he would leave the technical explanation of HB 573 to Peter Funk. He said the bill was originally introduced in 1989 and was killed, so he had it referred to a different committee this session. Representative Rice explained that the bill passed the House floor on a compromise.

Proponents' Testimony:

Peter Funk, Office of the Attorney General, said his office has wanted to change "final conviction" language for years. He explained that the problem is caused by lines 14 and 15 in the original bill, and line 16 in the amended bill. Mr. Funk commented that there is confusion over what "final conviction" means. He said the Department looked at case law nationwide, and concluded

that it was a combination of finding of guilt and imposition of a sentence. Mr. Funk explained that the Department counts motor vehicle convictions when they are coupled with a sentence, and that he did not believe that convictions should not be recorded.

Mr. Funk further advised the Committee, that if the Department follows this conclusion, it cannot count deferred imposition of sentence. He stated that DOJ doesn't want to count situations where there is negligent homicide or negligent vehicular assault, but most of those people only get a deferred imposition of sentence. Mr. Funk explained that the insurance companies don't know about these incidents then, because there is no motor vehicle record.

Peter Funk told the Committee the Department believes this is ridiculous. He commented that the House Judiciary Committee has killed this bill twice, and that there is compromise language in the bill now, stating that it can be counted "if the underlying offense is a felony". Mr. Funk asked the Committee not to put the bill back in its original form, as the House would kill it.

Opponents' Testimony:

There were no opponents of the bill.

Questions From Committee Members:

Senator Towe asked if this legislation were limited strictly to traffic offenses. Peter Funk replied it is, and said the bill applies to all of Title 61 relative to the exclusion to motor vehicles in general. He said Parts 1 and 3 of Chapter 5 refer to licensing activities that the Department takes, and that 61-11-101 and -102, MCA, refer to general record-keeping provisions. Mr. Funk stated that the definition of conviction has no application outside the motor vehicle area.

Senator Towe asked if felony deferred imposition of sentence should remain on record after probation is fulfilled. Peter Funk replied it should not. He said Title 46, relative to deferred imposition of sentence, would apply, and mandates this as confidential criminal justice information after the terms of deferral are fulfilled.

Senator Svrcek asked if these incidents remain part of the public record for a period of time. Peter Funk replied they are deferred and then become confidential, which does give these people a break. He explained that his sympathy extends to the point of imposing a deferred sentence.

Mr. Funk cited a case in Lake County where a California woman was killed by a drunk driver who never lost (his) license. He said the Department received many calls concerning this incident.

Senator Svrcek asked if there is a difference between maintaining confidential records and expunging them. Peter Funk replied that there is a huge difference. He explained that the 1989 Session completely eliminated the language of expungement, but the Department feels the records should exist somewhere if a negligent homicide or negligent vehicular assault happens a second time. He said the end result is this information is labeled as confidential criminal justice information.

Chairman Pinsoneault said he once called at least six different insurance carriers to check their policy on careless and reckless driving citations. He advised the Committee that he found the companies use their own discretion, and that this varies.

Closing by Sponsor:

Representative Rice told the Committee that the 1989 Legislature passes legislation to record deferred imposition of sentence for all but traffic fines. He said the House found out the Silverbow County can provide deferred sentences for DUI.

DISCUSSION ON HOUSE BILL 559

Senator Towe asked for time to prepare amendments concerning the reinstatement of drugs in HB 559.

Senator Halligan said he would oppose adding probably cause.

Senator Towe stated he had four amendments relating to drugs.

Senator Pinsoneault stated the Committee would wait for the amendments.

EXECUTIVE ACTION ON HOUSE BILL 572

Motion:

Senator Harp made a motion that HB 572 BE CONCURRED IN.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

The motion made by Senator Harp carried unanimously. Senator Pinsoneault said he would carry HB 572.

EXECUTIVE ACTION ON HOUSE BILL 571

Motion:

Senator Harp made a motion that HB 571 BE CONCURRED IN.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

The motion made by Senator Harp carried unanimously. Senator Towe was asked to carry the bill.

EXECUTIVE ACTION ON HOUSE BILL 573

Motion:

Senator Svrcek made a motion that HB 573 BE CONCURRED IN.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

The motion made by Senator Svrcek carried unanimously. Senator Svrcek was asked to carry the bill.

ADJOURNMENT

Adjournment At: 12:00 noon.

Senator Dick Pinsoneault, Chairman

Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991 Date 25 Mar 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

March 25, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 668 (third reading copy -- blue), respectfully report that House Bill No. 668 be concurred in.

Signed: Richard Pinsoneault

Richard Pinsoneault, Chairman

3/25/91
Amd. Coord.

3/25 12:30
Sec. of Senate

HB668: Amended See Corrected SCR dated 4-1-91 4/1/91

SENATE STANDING COMMITTEE REPORT

March 25, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 571 (third reading copy -- blue), respectfully report that House Bill No. 571 be concurred in.

Signed: _____
Richard Pinsonault, Chairman

Amd. Coord.

Sec. of Senate

SENATE STANDING COMMITTEE REPORT

March 25, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 572 (third reading copy -- blue), respectfully report that House Bill No. 572 be concurred in.

Signed: _____
Richard Pinsoneault, Chairman

3-25-91
Amd. Coord.

SB 3-25 12:30
Sec. of Senate

SENATE STANDING COMMITTEE REPORT

March 25, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 573 (third reading copy as amended -- blue), respectfully report that House Bill No. 573 be concurred in.

Signed: _____
Richard Pinsoneault, Chairman

3-27-91
Amd. Coord.

3-25
Sec. of Senate

EX # 1
25 Mar 91 2-21-91
HB 559

HOUSE STANDING COMMITTEE REPORT

February 20, 1991

Mr. Speaker: We, the committee on Judiciary report that House Bill 559 (first reading copy -- white) do pass as amended .

Signed: _____
Bill Strizich, Chairman

And, that such amendments read:

1. Page 3, line 25.
Page 4, line 7.
Page 4, end of line 22 and beginning of line 23.
Page 5, line 8.
Page 5, end of line 16 and beginning of line 17
Page 7, lines 4 and 19.
Page 8, line 10.
Page 9, lines 16 and 18.
Page 24, line 9.
Page 26, lines 9 and 16.
Page 27, line 2.
~~Strike:~~ "or tests"
Insert

2. Page 4, lines 14 through 16.
~~Strike:~~ "A" on line 14 through end of line 16
Insert

3. Page 4, lines 3 and 4.
Page 7, lines 14 and 15.
Page 9, lines 2 and 3.
Page 9, lines 11 and 12.
Page 23, line 24.
Page 24, lines 12 and 13.
Page 25, line 20.
Page 27, line 5 and line 13.
~~Strike~~: ", drugs, or a combination of the two"
Insert

4. Page 26, line 11.
~~Strike:~~ "."
Insert

5. Page 26, line 12.
~~Strike:~~ "drugs, or a combination of the two"
Insert

EX # 2
25 Mar 91
HB 559

Amendment to House Bill No. 559
Third Reading Copy (Blue)

Prepared by Peter Funk
Department of Justice
March 25, 1991

1. Page 7, line 17.
Following: "admissible"
Strike: ";"
Insert: ". A person may not be convicted of a violation of 61-8-401 based upon the presence of a drug or drugs in his person unless some other competent evidence exists tending to establish that the person was under the influence of a drug or drugs while driving or in actual physical control of a motor vehicle within this state;

Ex #3
25 Mar 91
HB 559

STATE OF MONTANA

DEPARTMENT OF JUSTICE

FORENSIC SCIENCE DIVISION

Marc Racicot
Attorney General

Broadway Building
554 West Broadway - 6th Floor
Missoula, MT 59802

Mister Chairman and Members of the Senate Judiciary Committee,

My name is Phillip I. Lively, I am employed by the Forensic Science Division, Department of Justice, where I am the Director of the Breath Analysis Program.

The following testimony is in regards to the changes and amendments in House Bill 559, concerning Title 61 chapter 8 part 4, as presented by the House Judiciary Committee

THE PROPOSED SECTIONS OF THE BILL CONCERNING MULTIPLE TESTING AND THE ADDITION OF DRUGS, OR ANY COMBINATION OF THE TWO WERE PRESENTED AS FOLLOWS:

THE PROPOSED WORDING IS UNDERLINED

61-8-402 (THE IMPLIED CONSENT SECTION)

BLOOD, BREATH, OR URINE TESTS. (1) ANY PERSON WHO OPERATES OR IS IN ACTUAL PHYSICAL CONTROL OF A VEHICLE UPON THE WAYS OF THE STATE OPEN TO THE PUBLIC SHALL BE DEEMED TO HAVE GIVEN CONSENT, SUBJECT TO THE PROVISIONS OF 61-8-401, TO A TEST OR TESTS OF HIS BLOOD BREATH, OR URINE FOR THE PURPOSES OF DETERMINING ANY MEASURED AMOUNT OR PRESENCE OF ALCOHOL, DRUGS, OR ANY COMBINATION OF THE TWO IF ARRESTED BY A PEACE OFFICER FOR DRIVING OR FOR BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL, DRUGS OR ANY COMBINATION OF THE TWO. THE TEST OR TESTS SHALL BE ADMINISTERED AT THE DIRECTION OF A POLICE OFFICER HAVING REASONABLE GROUNDS TO BELIEVE THE PERSON TO HAVE BEEN DRIVING OR IN ACTUAL PHYSICAL CONTROL OF A VEHICLE UPON THE WAYS OF THE STATE OPEN TO THE PUBLIC WHILE UNDER THE INFLUENCE OF ALCOHOL, DRUGS, OR ANY COMBINATION OF THE TWO. THE ARRESTING OFFICER MAY DESIGNATE WHICH TEST OR TESTS SHALL BE ADMINISTERED. A PERSON MAY NOT BE GIVEN MORE THAN TWO TESTS UNLESS THE PERSON CHOOSES TO HAVE AN ADDITIONAL TEST AS PROVIDED IN 61-8-405 (2)

61-8-404 (EVIDENCE ADMISSIBILITY)

(A) EVIDENCE OF ANY MEASURED AMOUNT OR DETECTED PRESENCE OF ALCOHOL, DRUGS, OR ANY COMBINATION OF THE TWO IN THE PERSON AT THE TIME OF THE ACT ALLEGED, AS SHOWN BY AN ANALYSIS OF HIS BLOOD, BREATH OR URINE IS ADMISSIBLE...

AS TO THE NEED FOR TESTING INDIVIDUALS FOR THE PRESENCE OF DRUGS IN A DRIVING UNDER THE INFLUENCE CASE:

THE INCREASING ROLE OF DRUGS, ILLICIT OR OTHERWISE, IN OUR EVERY DAY LIFE IS A CONCERN THAT I AM SURE ALL OF US HERE SHARE. EVERY DAY THE NEWS MEDIA REPORTS ON THE EVER ESCALATING USE AND ABUSE OF DRUGS AND THEIR CONSEQUENCES. THIS CONDITION EXITS THROUGHOUT THE COUNTRY AND UNFORTUNATELY MONTANA IS NOT IMMUNE.

WHEN ONE CONTEMPLATES THE "DRUG PROBLEM" ONE SPECIFIC FACET THAT MUST BE ADDRESSED IS THE ROLE OF DRUGS AND THE SAFE OPERATION OF A MOTOR VEHICLE.

THE ROLE OF ALCOHOL IN MOTOR VEHICLE OPERATION AND FATAL ACCIDENTS IS WELL ESTABLISHED, HOWEVER THE ROLE OF DRUGS IS JUST NOW BECOMING APPARENT.

IN SUPPORT OF MODIFYING THE CURRENT IMPLIED CONSENT PROVISION (61-8-402) OF THE DRIVING UNDER THE INFLUENCE LAW, THE FOLLOWING STUDIES AUGMENTED BY DATA COLLECTED BY THE FORENSIC SCIENCE DIVISION IS OFFERED.

IN 1983 THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY FUNDED A STUDY CONCERNING ALCOHOL AND DRUG PRESENCE IN FATALLY INJURED MALE DRIVERS. THE STUDY WAS BASED ON DATA COLLECTED FROM LOS ANGLES COUNTY, ORANGE COUNTY, SACRAMENTO COUNTY, AND SAN DIEGO COUNTY, CALIFORNIA. THE STUDY CONCERNED ITSELF WITH MALES BETWEEN THE AGES OF 15 TO 34 YEARS OF AGE WHO WERE KILLED IN AUTOMOBILE ACCIDENTS. THE NUMBER OF INDIVIDUALS WHO MET THE STUDY CRITERIA WAS 440. THEIR FINDINGS ARE SUMMARIZED BELOW:

TEST POPULATION = 440
SAMPLE SELECTED FOR ANALYSIS WAS BLOOD
SAMPLES WHERE ANALYZED FOR ALCOHOL, MARIJUANA, COCAINE, DIAZEPAM (VALIUM), PHENCYCLIDINE (PCP), AND METHAMPHETAMINE (SPEED).

OF THE 440 INDIVIDUALS 308 OR 81% WERE POSITIVE FOR ALCOHOL AND OR DRUGS

OF THE 81%, 70% WERE POSITIVE FOR ALCOHOL
43% HAD TWO OR MORE DRUGS ON BOARD
37% WERE POSITIVE FOR MARIJUANA
11% WERE POSITIVE FOR COCAINE
4% WERE POSITIVE FOR DIAZEPAM
4% WERE POSITIVE FOR PHENCYCLIDINE
3% WERE POSITIVE FOR METHAMPHETAMINE

EXCEPT FOR ALCOHOL, DRUGS WERE INFREQUENTLY FOUND ALONE IN THE SYSTEM, AND WERE TYPICALLY IN COMBINATION WITH HIGH ALCOHOL CONCENTRATIONS.

OTHER STUDIES HAVE DEMONSTRATED SIMILAR FINDINGS.

IN ONTARIO, CANADA 26% OF NON-FATAL INJURED DRIVERS TESTED POSITIVE FOR DRUGS OTHER THAN ALCOHOL.

IN ROCHESTER, NEW YORK 22% OF NON-FATAL INJURED DRIVERS PERCENT TESTED POSITIVE FOR DRUGS OTHER THAN ALCOHOL.

IN SAN BERNARDINO COUNTY 21% OF FATAL INJURED DRIVERS TESTED POSITIVE FOR DRUGS OTHER THAN ALCOHOL.

OF SPECIAL NOTE A STUDY CONDUCTED IN SWEDEN IDENTIFIED THAT 21% OF INDIVIDUALS ARRESTED (NO ACCIDENT OR INJURY INVOLVED) FOR SUSPICION OF DRIVING UNDER THE INFLUENCE OF ALCOHOL WERE DRUGGED IMPAIRED.

TO BRING THESE FIGURES INTO FOCUS FOR MONTANA THE FORENSIC SCIENCE DIVISION, TOXICOLOGY SECTION PROVIDES THE FOLLOWING DATA.

IN 1990 585 SAMPLES WERE SUBMITTED AS MOTOR VEHICLE ACCIDENTS (MVA) AND DRIVING UNDER THE INFLUENCE OF DRUGS (DUID)

DRUGS WERE FOUND TO BE PRESENT IN 26% OF THE SAMPLES

THE BREAKDOWN FOR THE DRUGS OF MAJOR CONCERN IS AS FOLLOWS:

LOCAL ANAESTHETIC (LIDOCAINE)	18%
NARCOTICS (CODEINE)	11%
TRANQUILIZERS (VALIUM)	21%
SEDATIVES/HYPNOTIC	3%
STIMULANTS (COCAINE) (AMPHETAMINE)	7%
ANTICONVULSANT	9%
ANTIDEPRESSANTS (MOOD ELEVATORS)	5%
BARBITURATES	2%

OF THE CASES DETERMINED POSITIVE, 31% HAD TWO OR MORE DRUGS IN SYSTEM.

IT WAS NOT UNTIL JUST RECENTLY, THAT THE FORENSIC SCIENCE DIVISION HAD THE CAPABILITY TO SCREEN FOR MARIJUANA IN BLOOD. IN AN EFFORT TO ESTIMATE THE USE LEVEL OF MARIJUANA IN THIS CATEGORY, THE TOXICOLOGY DIVISION SCREENED 100 RANDOMLY SELECTED SAMPLES AND FOUND 30% TO BE POSITIVE FOR MARIJUANA.

AS TO THE CREATION OF MULTIPLE TESTS UNDER 61-8-402; THE IMPLIED CONSENT SECTION:

THE MAJORITY OF DRIVERS STOPPED FOR THE CLASSIC SYMPTOMS OF DRIVING UNDER THE INFLUENCE WILL BE TESTED FOR ALCOHOL. THE FOCAL POINT OF THE POLICE OFFICER IN THE PAST HAS ALWAYS BEEN ALCOHOL. THIS FOCUS IS NOW CHANGING AND TRAINING FOR LAW ENFORCEMENT PERSONNEL IS NOW BRANCHING INTO THE AREA OF DRUG AWARENESS AND DETECTION. UNDER THE CURRENT IMPLIED CONSENT PROVISION TWO ELEMENTS SEVERELY RESTRICT THE ABILITY TO CONDUCT AN ANALYSIS FOR THE PRESENCE OF DRUGS.

NUMBER ONE. THE CURRENT IMPLIED CONSENT PROVISION STATES THAT AN INDIVIDUAL MUST SUBMIT A SAMPLE OF BREATH, BLOOD, OR URINE "TO DETERMINE THE ALCOHOL CONTENT OF THE BLOOD" . THIS STATEMENT THEREFORE PROHIBITS THE COLLECTION OF A SAMPLE FOR DETERMINING THE PRESENCE OF A DRUG.

NUMBER TWO. THE CURRENT IMPLIED CONSENT PROVISION ALSO REFERS TO "A TEST". THIS HAS ALWAYS BEEN A POINT OF CONFUSION BETWEEN SCIENCE AND LAW. "A TEST" IN SCIENCE MAY MEAN A NUMBER OF INDIVIDUAL ANALYSES PERFORMED ON A NUMBER OF SAMPLES TO REACH A CONCLUSION. HOWEVER, IN LAW "A TEST" IS NORMALLY INDICATIVE OF A SINGLE ANALYSIS ON A SINGLE SAMPLE, HENCE THE INABILITY TO TEST FOR BOTH ALCOHOL AND DRUGS UTILIZING SEPARATE SAMPLES . THIS CREATES A MAJOR PROBLEM IN DEALING WITH DRIVERS IN TODAY'S DRUG EFFECTED SOCIETY.

THE MAJORITY OF INDIVIDUALS ARRESTED FOR DUI WILL BE UNDER THE INFLUENCE OF ALCOHOL AND WILL BE OFFERED A BREATH ANALYSIS TO DETERMINE THEIR ALCOHOL CONCENTRATION. HOWEVER, THOSE INDIVIDUALS USING DRUGS ALSO KNOW THIS, AND EMPLOY THE TECHNIQUE OF GULPING DOWN ONE OR TWO DRINKS RIGHT BEFORE THEY DRIVE. WHEN A POLICE OFFICER STOPS THIS INDIVIDUAL, THE FIRST OBSERVATION IS THAT THERE IS A SMELL OF AN ALCOHOLIC BEVERAGE PRESENT AND THAT POLICE OFFICER IS NOW IN A MIND SET OF ALCOHOL. PERFORMANCE TESTS ARE CONDUCTED, THE DECISION TO ARREST IS REACHED, THE INDIVIDUAL IS TRANSPORTED TO THE STATION WHERE A BREATH ANALYSIS IS PERFORMED AND THE RESULT IS AN ALCOHOL CONCENTRATION WHICH IS INCONSISTENT WITH THE PERSONS ACTIONS.

THE OBSERVED IMPAIRMENT IS A RESULT OF DRUGS AND NOT ALCOHOL. AT THIS POINT THE OFFICER IS STOPPED. "A TEST" HAS BEEN PERFORMED AND THE INDIVIDUAL CANNOT BE TESTED ANY FURTHER EVEN THOUGH IT IS NOW OBVIOUS THAT THE IMPAIRMENT IS A RESULT OF A SUBSTANCE OTHER THAN ALCOHOL.

THE ADDITION OF MULTIPLE TESTING IN THE IMPLIED CONSENT SECTION ALLOWS THE LAW ENFORCEMENT OFFICER TO HANDLE SITUATIONS SUCH AS THE VERY COMMON ONE DESCRIBED. IF ONE IS REQUIRING PROBABLE CAUSE FOR THE PRESENCE OF DRUGS THERE IS NONE BETTER THAN AN ALCOHOL CONCENTRATION INCONSISTENT WITH THE PERSONS OBSERVABLE ACTIONS AND ABILITIES.

IT SHOULD BE POINTED OUT THAT THE SECOND TEST IS PRIMARILY FOR DRUGS, NOT TO BE ABLE TO CONDUCT A SECOND BREATH OR BLOOD ALCOHOL ANALYSIS. FURTHER, IF A COMPLETED BREATH ANALYSIS HAS BEEN CONDUCTED, THE FORENSIC SCIENCE DIVISION WILL NOT RE-EVALUATE THE SUBMITTED SECOND SAMPLE FOR THE ALCOHOL CONCENTRATION, UNLESS EXTENUATING CIRCUMSTANCES ARE PRESENT AND DOCUMENTED.

THE PRIMARY SAMPLES FOR THE ANALYSIS OF ALCOHOL AND DRUGS ARE; BREATH OR BLOOD FOR THE ALCOHOL AND BLOOD FOR THE PRESENCE OF DRUGS. THERE IS ALWAYS CONCERN AS THE TO VALIDITY OF A URINE SAMPLE IN A DUI CASE SINCE THE SUBSTANCES DETECTED IN THE URINE ARE NOT THE ACTUAL DRUG OR DRUGS BUT A METABOLITE OF THE DRUG OR DRUGS. IN FACT IF URINE WERE TO BE STRICKEN FROM THE IMPLIED CONSENT SECTION THE FORENSIC SCIENCE DIVISION WOULD NOT OBJECT.

THE DELETION OF THE ABILITY AND AUTHORITY TO OBTAIN AND TEST MULTIPLE BIOLOGICAL SAMPLES HAVE A MULTI-PRONGED EFFECT.

1. THERE CANNOT BE ANY VIABLE PROSECUTION OF A SUSPECT FOR DRIVING UNDER THE INFLUENCE OF DRUGS. NOT ONLY WAS THE REFERENCES TO DRUGS ELIMINATED FROM THE IMPLIED CONSENT PORTION (61-8-402) BUT ALL REFERENCES TO DRUGS IN THE EVIDENCE ADMISSIBILITY SECTION (61-8-404) WERE REMOVED AS WELL.

2. SINCE THE DIVISION OF FORENSIC SCIENCE REQUESTED SPECIFIC AUTHORITY TO ANALYZE OBTAINED BIOLOGICAL SAMPLES FOR THE PRESENCE OF DRUGS AND WAS DENIED THAT AUTHORITY, IT IS QUITE POSSIBLE THAT WE MAY NO LONGER BE ABLE TO PROVIDE THAT SERVICE FOR THE LAW ENFORCEMENT AGENCIES ON A DRIVING UNDER THE INFLUENCE ARREST WHERE DRUGS ARE SUSPECT.

3. THE ABILITY FOR A LAW ENFORCEMENT OFFICER TO CONDUCT TESTS IN AN EFFORT TO DETECT AN INDIVIDUAL DRIVING UNDER THE INFLUENCE OF DRUGS IS ELIMINATED. THE NATIONAL HIGHWAY TRAFFIC SAFETY DIVISION PROVIDES TRAINING FOR LAW ENFORCEMENT OFFICERS THROUGH A PROGRAM KNOWN AS THE "DRUG RECOGNITION AND EVALUATION TRAINING". THIS PROGRAM HAS PROVEN TO BE EXTREMELY SUCCESSFUL IN THOSE AREAS WHICH HAVE RECEIVED AND IMPLEMENTED THE TRAINING. THOSE TRAINED OFFICERS CAN NOT ONLY DETECT THE PRESENCE OF A DRUG BUT CAN ALSO CORRELATE THE OBSERVABLE IMPAIRMENT TO A GROUP OR GROUPS OF DRUGS. I RECENTLY RECEIVED VERBAL APPROVAL FROM ONE OF THE NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION REPRESENTATIVES, WASHINGTON D.C. THAT THEY WOULD CONDUCT SUCH A TRAINING FOR OUR LAW ENFORCEMENT OFFICERS, HOWEVER, THE MAJOR REQUIREMENT FOR RECEIVING THE TRAINING IS THAT THE LAW ALLOWS FOR MULTIPLE TESTING. WE NOW WILL NOT QUALIFY FOR THIS IMPORTANT AND PROGRESSIVE ADDITION TO THE LAW ENFORCEMENT ARSENAL AGAINST DRUGS. THIS TOOL IS NOT ONLY BENEFICIAL TO THE ENFORCEMENT OF THE DUI PROGRAM BUT IT IS ALSO VERY HELPFUL IN IDENTIFYING DRUG USAGE IN OTHER SITUATIONS WERE DRUGS USE IS SUSPECTED.

FROM COMMENTS GATHERED CONCERNING THE HOUSE JUDICIARY ACTION IT APPEARS THAT THEIR PRIMARY CONCERN WAS WHETHER A PARTICULAR LEVEL OF A DRUG ALSO INDICATED IMPAIRMENT OF AN INDIVIDUAL.

HISTORICALLY WE HAVE ALWAYS RELATED IMPAIRMENT, OR MORE CORRECTLY BEING UNDER THE INFLUENCE, TO THE ALCOHOL CONCENTRATION. THE .10% ALCOHOL CONCENTRATION HAS BEEN USED AS THE GUIDELINE FOR THIS ASSESSMENT FOR A NUMBER OF YEARS. THE FACT IS THAT WITH ALCOHOL WE CAN MAKE A STATEMENT SUCH AS "IF AN INDIVIDUAL HAS AN ALCOHOL CONCENTRATION OF .10% OR HIGHER THAT INDIVIDUAL'S ABILITY TO OPERATE A VEHICLE SAFELY HAS BEEN DIMINISHED". THIS STATEMENT IS SCIENTIFICALLY CORRECT (IN FACT SCIENTIFICALLY CONDUCTED TESTING HAS ESTABLISHED BEYOND A DOUBT THAT THE LEVEL SHOULD IN FACT BE .08%) HOWEVER, THE SAME STATEMENT DOES NOT HOLD TRUE FOR OTHER DRUGS.

TO ILLUSTRATE THIS POINT, AN EXCERPT FROM A LETTER PREPARED BY JIM HUTCHINSON, CHIEF TOXICOLOGIST FOR THE FORENSIC SCIENCE DIVISION IS INCLUDED:

> JUST RECENTLY A COLLEAGUE AND I RETURNED FROM THE 43RD ANNUAL CONFERENCE OF THE AMERICAN ACADEMY OF FORENSIC SCIENCE. THIS ANNUAL MEETING IS A GATHERING OF THE WORLD'S LEADING AUTHORITIES IN THE AREA OF CRIMINALISTIC, JURISPRUDENCE, PATHOLOGY, BIOLOGY, TOXICOLOGY, PSYCHIATRY, ETC. THE PURPOSE OF THE MEETING IS THE EXCHANGE OF ANALYTICAL IDEAS, INFORMATION FOUND THROUGH RESEARCH, EXCHANGE OF CONCEPTS WITH PEERS AND COLLEAGUES AND THEREBY FURTHER THE DISCIPLINE OF FORENSIC SCIENCE.
>
> WE WERE FORTUNATE TO ATTEND AN EIGHT HOUR WORKSHOP ENTITLED "THE EFFECT OF DRUGS ON HUMAN PERFORMANCE: DRUGS AND DRIVING, DRUGS IN THE WORK PLACE. THE WORKSHOP WAS SPONSORED BY THE U.S. DEPARTMENT OF TRANSPORTATION AND THE NATIONAL HIGHWAY SAFETY ADMINISTRATION.

ONE OF THE BASIC QUESTIONS OF THOSE IN ATTENDANCE WAS; "CAN WE IN FACT ESTABLISH THAT A PARTICULAR BLOOD DRUG LEVEL DETERMINES IMPAIRMENT?" THIS IS A QUESTION THAT HAS BEEN INVESTIGATED OVER AND OVER FOR THE PAST 20 YEARS.

RESEARCHERS COMMENCING AS EARLY AS THE 1920'S BEGAN STUDYING ALCOHOL AND IT'S EFFECTS ON HUMAN PERFORMANCE. THESE STUDIES HAVE CONSISTENTLY ESTABLISHED THAT A PARTICULAR ALCOHOL LEVEL CAN SCIENTIFICALLY DETERMINE IMPAIRMENT. THE RESULTS OF THESE MANY HUNDREDS OF STUDIES HAVE BEEN ACCEPTED AND AGREED TO BY RECOGNIZED AUTHORITIES AROUND THE WORLD.

BEGINNING IN THE 1950'S MAJOR STUDIES WERE BEGAN TO INVESTIGATE THE EFFECTS OF LICIT AND ILLICIT DRUGS ON HUMAN PERFORMANCES. ONE FACTOR BECAME VERY APPARENT VERY QUICKLY. EVEN THOUGH THE GENERAL POPULATION REACTED TO ALCOHOL IN A CONSISTENT MANNER IN REGARDS TO IMPAIRMENT AND SPECIFIC ALCOHOL CONCENTRATIONS THE SAME COULD NOT BE SAID WHEN EVALUATING OTHER DRUGS. THE PHARMACOLOGICAL AFFECTS OF ALCOHOL ARE IN FACT INDEPENDENT OF AGE, SEX, AND INDIVIDUAL BIOLOGICAL METABOLISM--MAKING ALCOHOL A VERY UNIQUE DRUG. UNLIKE ALCOHOL THE PHARMACOLOGICAL AFFECTS OF <u>DRUGS</u> CAN VARY FROM INDIVIDUAL TO INDIVIDUAL DEPENDING ON AGE, SEX ETC. THE SAME BLOOD LEVEL CAN LICIT TWO VERY DIFFERENT RESPONSES, EVEN IN THE SAME INDIVIDUAL. THE OVERWHELMING CONSENSUS OF THE FORENSIC, MEDICAL AND SCIENTIFIC COMMUNITY WAS BORNE OUT AGAIN AND RE-AFFIRMED AT THIS CONFERENCE BY THE AMERICAN ACADEMY OF FORENSIC SCIENCE AND THE NATIONAL SAFETY COUNCIL COMMITTEE ON ALCOHOL AND OTHER DRUGS.
<u>BLOOD DRUG LEVELS HAVE NOT, ARE NOT, AND CAN NOT BE ESTABLISHED AS INDICATORS OR DETERMINERS OF IMPAIRMENT</u> IN AND OF THEMSELVES.

IT MUST BE UNDERSTOOD THAT THE ROLE OF SCIENTIFIC ANALYSIS IN DETERMINING ALCOHOL OR DRUG LEVELS IN AN INDIVIDUAL, IS NOT AND SHOULD NOT BE THE PRIMARY INDICATOR OF IMPAIRMENT. THE LAW ENFORCEMENT OFFICER'S OBSERVATIONS, EVALUATIONS AND PERFORMANCE TEST RESULTS PROVIDE THE FUNDAMENTAL EVIDENCE OF THE SUBJECTS IMPAIRMENT. CHEMICAL OR SCIENTIFIC ANALYSIS PROVIDE THE CONFIRMATION.

THE REMOVAL OF THE MULTIPLE TESTS AND DRUG REFERENCES FROM HOUSE BILL 559 HAS MANY FAR REACHING EFFECTS, NOT ONLY IN THE ENFORCEMENT OF THE DUI STATUTE, IT COULD INHIBIT THE FURTHER ADVANCEMENT OF THE STATES DESIRE TO ENSURE SAFE HIGHWAYS AND TO COMBAT THE OVERALL WAR ON DRUGS.

by any other State or has been disqualified from operating a commercial motor vehicle by any other State or the Secretary.

SEC. 12010. GRANT PROGRAM.

(a) ESTABLISHMENT.—The Secretary may make a grant to a State in a fiscal year if the State enters into an agreement with the Secretary to participate in such fiscal year in the commercial driver's license program established by this title and the information system required by this title and to comply with the requirements of section 12009.

(b) MINIMUM AMOUNT OF GRANT.—The Secretary shall determine the amount of grants in a fiscal year to be made under this section to a State eligible to receive such grants in the fiscal year; except that—

(1) such State shall not be granted less than $100,000 under this section in the fiscal year; and

(2) to the extent that any States are granted more than $100,000 per State in the fiscal year under this section, the Secretary shall ensure that such States are treated equitably.

(c) LIMITATION ON USE OF FUNDS.—A State receiving a grant under this section may only use the funds provided under such grant for issuing commercial driver's licenses and complying with the requirements of section 12009.

(d) CONTRACT AUTHORITY.—Notwithstanding any other provision of law, approval by the Secretary of a grant to a State under this section shall be deemed to be a contractual obligation of the United States for payment of the amount of the grant.

(e) PERIOD OF AVAILABILITY.—Funds made available to carry out this section shall remain available for obligation by the State for the fiscal year for which such funds are made available. Any of such funds not obligated before the last day of such period shall no longer be available to such State and shall be available to the Secretary for carrying out the purposes of this title. Funds made available pursuant to this section shall remain available until expended.

(f) FUNDING.—There shall be available to the Secretary to carry out this section $5,000,000 from funds made available to carry out section 404 of the Surface Transportation Assistance Act of 1982 for each of fiscal years 1989, 1990, and 1991.

SEC. 12011. WITHHOLDING OF HIGHWAY FUNDS FOR STATE NONCOMPLIANCE.

(a) FIRST YEAR.—The Secretary shall withhold 5 percent of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of title 23, United States Code, on the first day of the fiscal year succeeding the first fiscal year beginning after September 30, 1992, throughout which the State does not substantially comply with any requirement of section 12009(a) of this Act.

(b) AFTER THE FIRST YEAR.—The Secretary shall withhold 10 percent of the amount required to be apportioned to any State under each of sections 104(b)(1), 104(b)(2), 104(b)(5), and 104(b)(6) of such title on the first day of each fiscal year after the second fiscal year beginning after September 30, 1992, throughout which the State does not substantially comply with any requirement of section 12009(a) of this Act.

(c) PERIOD OF AVAILABILITY; EFFECT OF COMPLIANCE AND NONCOMPLIANCE.—

(1) FUNDS WITHHELD ON OR BEFORE SEPTEMBER 30, 1995.—

(A) PERIOD OF AVAILABILITY.—Any funds withheld under this section from apportionment to any State on or before September 30, 1995, shall remain available for apportionment to such State as follows:

(i) If such funds would have been apportioned under section 104(b)(5)(B) of such title but for this section, such funds shall remain available until the end of the second fiscal year following the fiscal year for which such funds are authorized to be appropriated.

(ii) If such funds would have been apportioned under section 104(b)(1), 104(b)(2), or 104(b)(6) of such title but for this section, such funds shall remain available until the end of the third fiscal year following the fiscal year for which such funds are authorized to be appropriated.

(B) FUNDS WITHHELD AFTER SEPTEMBER 30, 1995.—No funds withheld under this subsection from apportionment to any State after September 30, 1995, shall be available for apportionment to such State.

(2) APPORTIONMENT OF WITHHELD FUNDS AFTER COMPLIANCE.—If, before the last day of the period for which funds withheld under this section from apportionment are to remain available for apportionment to a State under paragraph (1), the State substantially complies with all of the requirements of section 12009(a) of this Act for a period of 365 days, the Secretary shall on the day following the last day of such period apportion to such State the withheld funds remaining available for apportionment to such State.

(3) PERIOD OF AVAILABILITY OF SUBSEQUENTLY APPORTIONED FUNDS.—Any funds apportioned pursuant to paragraph (2) shall remain available for expenditure until the end of the third fiscal year succeeding the fiscal year in which such funds are apportioned. Sums not obligated at the end of such period shall lapse or, in the case of funds apportioned under section 104(b)(5) of such title, shall lapse and be made available by the Secretary for projects in accordance with section 118(b) of such title.

(4) EFFECT OF NONCOMPLIANCE.—If, at the end of the period for which funds withheld under this section from apportionment are available for apportionment to a State under paragraph (1), the State has not substantially complied with all of the requirements of section 12009(a) of this Act for a 365-day period, such funds shall lapse or, in the case of funds withheld from apportionment under section 104(b)(5) of such title, such funds shall lapse and be made available by the Secretary for projects in accordance with section 118(b) of such title.

SEC. 12012. PENALTIES.

(a) NOTICE OF VIOLATION.—Paragraph (1) of section 521(b) of title 49, United States Code, is amended by inserting "or section 12002, 12003, 12004, 12005(b), or 12008(d)(2) of the Commercial Motor Vehicle Safety Act of 1986" after "the Motor Carrier Safety Act of 1984" and by striking out "section" the second place it appears and inserting in lieu thereof "sections".

(b) CIVIL PENALTIES.—Paragraph (2) of such section is amended, by inserting "(A) IN GENERAL.—" before "Except as", by inserting "(other than subparagraph (B))" before ", except for recordkeeping

Ex #5
25 Mar 91
HB572

U.S. Department of Transportation
Federal Highway Administration

DRAFT

400 Seventh St., S.W.
Washington, D.C. 20590

JUL 27 [illegible]

Refer to: HCS-20

Through: Mr. Louis N. MacDonald
Regional Administrator
Lakewood, Colorado

Mr. Roger K. Scott
Division Administrator
Helena, Montana

Mr. Duane Tooley
Chief, Driver Services Bureau
Department of Justice
303 North Roberts
Helena, Montana 59620

Dear Mr. Tooley:

Thank you for the fine cooperation extended by your staff to Ms. Robin Smith, Ms. LuAnne Hansen and Mr. Dave Miller of the Federal Highway Administration during the Commercial Driver's License (CDL) confirmation review meeting in Helena, Montana, on June 15.

Most aspects of your CDL program meet the minimum standards. However, we cannot confirm your CDL issuance until we receive your assurances as to the satisfactory resolution of the immediate issues discussed below and until we are notified by the administrator of the Commercial Driver's License Information System (CDLIS) that the link between Montana and the CDLIS is fully operational.

Our observations on the Montana CDL program fall into two categories: immediate issues that will delay your confirmation letter if left unresolved; and long-term issues that may affect our future review of State compliance with section 12009(a) of the Commercial Motor Vehicle Safety Act of 1986.

The Immediate Issues are:

(1) Montana's definition of a commercial motor vehicle (CMV) in Section 23.3.502 does not specify that any trailer for a Class A representative vehicle must be greater than 10,000 pounds. While the procedures manual indicates that Class A vehicles must have a 10,000 pound or greater trailer, the manual also states that some drivers can be tested with a smaller trailer. We recognize the constraints States and drivers face in finding adequate "representative" test vehicles. If you do find it necessary to test custom harvesters and mobile home transporters with smaller trailers, their licenses must be restricted. The CDLIS Driver History Record provides a restriction code "O" which can be used to restrict this type of driver from operating tractor trailers. Also, if Montana keeps articulated buses in class A, a similar restriction must also be used for those drivers.

(2) The definition for a CMV contained in Section 23.3.502 seems to indicate that only vehicles over 10,000 pounds need hazardous materials placards and would, therefore, be subject to the CDL provisions. The procedures manual correctly indicates that any size vehicle transporting placarded amounts of hazardous materials is subject to these provisions. The Montana rules should be revised for consistency.

DRAFT

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(3) The definition for "tank endorsement" in Section 23.3.502 is incorrect in that it does not include tank vehicles used to transport gaseous materials. The word "bulk" should also be removed from the definition.

Long-term Issues In the course of our CDL confirmation review, we have made no judgment as to whether the State would be in substantial compliance with all 21 requirements included in Section 12009(a) of the Act. Since the States do not need to be "in substantial compliance" with these 21 requirements until the end of our Fiscal Year 1992, our formal review and determination will be made at a later time. Incidental to our CDL confirmation review, however, the following compliance issues were noted and are described below for your early information.

(4) Montana's law states that nonresident CDL holders may operate in Montana "subject to the age limits applicable to commercial vehicle operators in this State." Most nonresidents operating CMVs in Montana will be involved in interstate commerce and will have to be at least 21 years old because they are subject to the 49 C.F.R. Part 391 requirements. On the other hand, some States will license commercial vehicle operators as young as age 16 or 17 for "intrastate" operations outside of their home States. The FHWA currently regards as a State matter any State's policy on honoring, for purposes of intrastate commerce only, out of State CDLs held by persons not qualified to operate in interstate commerce. Since 49 C.F.R. Section 391.2 does grant age exemptions to certain classes of interstate drivers, such as custom harvesters, the State of Montana will need to clarify or amend the above wording to appropriately reflect these requirements.

(5) Montana's implied consent clause (Section 61-8-806) is only applied to a driver when a law enforcement officer has reasonable grounds to believe the driver's blood alcohol concentration (BAC) was 0.04 percent or more. The Federal rules require that drivers be subject to testing when they may have any measurable or detectable alcohol.

(6) Montana has adopted legislation implementing disqualifications for drivers convicted of 0.04 percent BAC offenses and refusing chemical tests. The State will also need to apply the disqualification provisions to drivers convicted of driving under the influence (DUI), leaving the scene of an accident, or using a CMV in the commission of a felony. Montana's law also needs to be amended to include lifetime, rather than 10-year, disqualifications for drivers convicted of <u>any combination of two</u> disqualifying offenses contained in Part 383.51(b). Most of these changes are reflected in the proposed State amendments scheduled for introduction in January 1991.

(7) The Montana legislation imposes 24-hour out-of-service periods for drivers testing at or over .04 BAC. Under the Federal rules, however, drivers must be placed out of service for 24 hours for any measurable or detectable amount of alcohol. Although MHP 391 may incorporate this, we have not seen a copy of it. Montana will need to bring its program into compliance either through a legislative or administrative rule change.

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(8) There seems to be a conflict between the sections of law which require the CDL disqualifications and Section 61-5-208. That section of law states that licenses cannot be revoked for more than 1 year except when the convictions are for violations of specific statutes.

(9) Section 23.3.521 states that "Emergency or administrative personnel not ordinarily assigned to duties involving the operation of commercial motor vehicles may operate commercial motor vehicles without an endorsement on an emergency basis. . . ." We need clarification of this administrative rule because it seems to cover drivers not granted waivers in the Commercial Driver's License Program; Waivers; Final Disposition published in the Federal Register on September 26, 1988.

With your written assurances relating to items (1) through (3) above, we look forward to being able to issue you a CDL confirmation letter immediately upon receipt of the required notification from the CDLIS Administrator.

If you have any questions about this letter or about any other aspects of our review, please contact Ms. LuAnne Hansen or Mr. Ronald Finn of my staff at (202) 366-4009. In the meantime, thanks again to you and your staff for your enthusiasm, commitment and comprehensive effort to comply with the requirements of the CDL program.

Sincerely yours,

R. P. Landis
Associate Administrator
for Motor Carriers

cc: Barry Goleman, Manager, AAMVAnet Inc.
Russel Simmons, CDLIS Administrator

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COMMITTEE ON HB 559 Senate Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Phil Lively	Forensic Science	HB559	X	
Jim Hutchison	Forensic Science	HB559	X	

(Please leave prepared statement with Secretary)

DATE 25 Mar 91 2 of 2

COMMITTEE ON Senate Judiciary

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Oppose
John Connor	MT County Attys Assn	HB559	✓	
Duane Tooley	Driver Services	HB571	✓	
" "	" "	HB572	✓	
" "	" "	HB573	✓	
Darrell Beckstrom	Driver Improvement	571 559 573 668	✓	
Pat Bradley	Mt Magistrates Assn	HB668	✓	
Peter Funk	Dept. of Justice			