MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN RUSSELL FAGG**, on January 29, 1993, at 8:00 a.m.

ROLL CALL

Members Present:

Rep. Russ Fagg, Chairman (R)
Rep. Randy Vogel, Vice Chairman (R)
Rep. Dave Brown (D)
Rep. Ellen Bergman (R)
Rep. Jody Bird (D)
Rep. Vivian Brooke (D)
Rep. Bob Clark (R)
Rep. Duane Grimes (R)
Rep. Scott McCulloch (D)
Rep. Jim Rice (R)
Rep. Angela Russell (D)
Rep. Tim Sayles (R)
Rep. Liz Smith (R)
Rep. Bill Tash (R)
Rep. Howard Toole (D)
Rep. Tim Whalen (D)
Rep. Diana Wyatt (D)

Members Excused: None.

Members Absent: Rep. Karyl Winslow (R)

Staff Present: John MacMaster, Legislative Council
Beth Miksche, Committee Secretary

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

Committee Business Summary:
Hearing: HB 282, HB 121, HB 258, SB 29
Executive Action: None

HEARING ON HB 282

Opening Statement by Sponsor:

REP. TIM WHALEN, HD 93, Billings. A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING THE LAW RELATING TO JOINT SEVERAL LIABILITY IN CIVIL CASES; PROVIDING THAT A PERSON WHOSE

NEGLIGENCE IS DETERMINED TO BE MORE THAN 10 PERCENT OF THE COMBINED NEGLIGENCE OF ALL DEFENDANTS IS JOINTLY LIABLE PROVIDING THAT LIABILITY OR NEGLIGENCE IS ATTRIBUTABLE ONLY AMONG PARTIES TO THE CIVIL ACTION; AND AMENDING SECTION 27-1-703, MCA."

Proponents' Testimony:

Russell Hill, Montana Trial Lawyers Association. EXHIBIT 1

Randy Bishop, private attorney specializing in civil cases, Billings. Mr. Bishop said HB 282 provides the committee, the legislature and the state of Montana the opportunity to reexamine legislation passed in 1987 which affected the civil justice system. The goal is to get rid of lawsuits as quickly, expeditiously, and simply as possible. The problem with current law is it requires filing lawsuits, but it requires filing more lawsuits than most attorneys representing people of injury would ever choose of their own volition. If an individual was to sue multiple parties, he would have to pay more lawyers and bring more lawsuits. Mr. Bishop proposes joint liability to permit intelligent use of medical and legal resources.

Monty Beck, Attorney, Bozeman. Mr. Beck emphasized the point that there are so many people who can become potential defendants, and it's causing so much confusion in the courtrooms that lawyers don't know how many people to sue. Many times, the state is picking up the tab for these people.

Joe Bottomly, Attorney, Great Falls. Mr. Bottomly recommended that the opponents and the proponents read the Montana Lottery article of 1989 because this is an objective analysis of this particular bill being considered. In that lottery article, the legislature made a mistake; the intent was good, but they went too far. The intent was that it is not fair that someone who has very little to do with causing an accident bear the full burden of the jury verdict. When there are two or more defendants, a person who is 20, 30 or 45 percent responsible is not at fault, but that person is a substantial factor in causing the lawsuit. **Mr. Bottomly** believes that if a person is 40 percent at fault, Montana should not be subsidizing these wrongdoers. He also said that under current law, anybody can be on jury duty. It's fundamental law in America that people who are going to be accused should be able to be in court in trial, to defend themselves. What this bill says is if a person is accused of something, he should be in court.

Opponents' Testimony:

John Alke, Montana Defense Trial Lawyers. Mr. Alke believes there has been a great deal of misinformation given about plaintiffs. He clarified some of this misinformation. The plaintiffs should be able to defend themselves; and if a defendant settles with a plaintiff, the other plaintiff is prohibited by Montana law from bringing in the settlement to

court and presenting it to the jury. Plaintiffs know that if they settle with one of the groups of defendants, they block the other defendant's rights to proceed against the settled defender. It is true that there was a doctrine called joint settlement liability, and that doctrine arose at a time when most states also had a doctrine called contributory negligence. Now there is comparative negligence. With contributory negligence, a plaintiff can recover if he is not more than 50 percent responsible for an accident; more importantly, the plaintiff can recover if all of the defendant's responsibilities imposed 50 percent of the accident even if no defendant is absolutely responsible for the accident. The current rule is the state of Montana will only pay 15 percent of the plaintiff's damages, but the state of Montana will pay 55 percent of the plaintiff's damages. What they are asking for is essentially a right to always have a solvent defendant, irrespective of fault. The second part of the bill says fault is only proportioned to the parties, not to the person responsible. The bill is setting up a system where it is a right to mislead the jury.

Gary Spaeth, Liability Coalition of Montana. Mr. Spaeth explained the tort reform package of 1987, its historical perspective, and said the legislature was faced with a liability and insurance crisis. The legislature argued at great length as to what the cause was of that crisis, but at that time, attorneys decided that the legislature would take a bipartisan approach. There were a lot of subcommittees that were appointed in instances that were extremely bipartisan. The American Bar Association article of 1987 discussed some of the problems this country was faced with, and one of the problems was joint and several liability. In 1987, the legislature balanced competing problems, competing interests. There are seven states that eliminated the doctrine, and 21 other states altered the doctrine.

Mona Jamison, The Doctor's Company. Ms. Jamison believes this bill represents a step backwards in terms of this particular area of the law. She said there is a rational relationship between 50 percent liability of fault and total responsibility for a claim. There is no rational relationship between the 10 percent responsibility and taking on more than that in terms of liability. To have dominus contact and ultimately be responsible for substantially more than that in terms of liability is not there. She said this bill basically sets up a deep pocket. A deep pocket being state and local government and also including insurance companies which means that other parties are not able to provide their fair share of the liability. This bill is a movement away from tort reform and is not compatible with this day and age. The fault and liability should be shared.

Brett Dahlman, Dept. of Administration and also representing Bruce Moerer, Montana School Board Association. Mr. Dahlman believes this bill puts a particular hardship on the members of public entities such as the state of Montana, which draws

attention from lawsuits even when they're not involved. HB 282 could cost the state's self-insurance fund. It could cost the fund generally thousands of dollars and will encourage litigation against the state of Montana.

James Tutwiler, Montana Chamber of Commerce. Mr. Tutwiler believes this bill is a major concern for the state of Montana because of unstable, unpredictable, and causal insurance becoming a problem for the private sector.

Alec Hansen, League of Cities and Towns said Montana depends on community service every day to help them through emergency situations. This is a self-insurance bill backed by municipal bonds, financed by property taxes and other revenues. Because of the vast exposure, people are particularly vulnerable to the deep pocket theory; for this reason, the League opposes this bill.

Steve Turkiewicz, Montana Auto Dealers Association. Mr. Turkiewicz said the proponents' plan is not rational. They are asking someone who is 10 percent liable for damages to pay for 100 percent of damages.

Bob Wood, Assistant City Attorney for City of Helena, said the City of Helena is opposed to this bill because it is fundamentally unfair if a defendant is 11 percent liable that defendant would be 100 percent liable for costs.

Jerry Loendorf, Montana Medical Association, stated this bill is unfair because it requires someone with a minimal amount of fault to pay the entire amount of damages and, in effect, pay for someone else's fault. The person who is responsible enough to buy insurance is required to pay for the uninsured and, as a result, the premium is raised. A lawyer can figure out who is at fault more if a person is 20 percent at fault or 80 percent at fault. Also, with regard to who has the money, any lawyer can find out who has the insurance and how much.

Bill Gianoulias, Chief Defense Counsel, Department of Administration, Risk Management and Tort Defense Division. EXHIBIT 2

Informational Testimony: None.

Questions From Committee Members and Responses:

REP. JIM RICE asked **Mr. Alke** if he addressed the allocation issues on page 2 of the bill and to discuss why people immune from liability should be listed on the bill. **Mr. Alke** said the decision of whom should and should not be liable was decided by the legislature . The legislature has made a policy decision, and **Mr. Alke** believes it's fundamentally unfair to say that the legislature decides who is immune. He thinks the companies with

the fees should pick up their responsibility. **Mr. Alke** said there is no way a plaintiff attorney would not know who's going to be on trial.

Closing by Sponsor:

REP. WHALEN said there are two issues to this bill: 1) What public policy should be with respect to fault. Should those individuals that are minimally at fault carry some of the proportion of fault. Plaintiff's lawyers don't like to sue. 2) It is an insult when a jury makes a decision to assign liability without proper records. As a matter of public policy, should the person who is 10 percent at fault pick up the tab, or should a law be kept in place that an innocent victim could pick up the tab? Although it may not be fair to the person who is only 10 percent at fault, at least that person contributed to the injuries to the person who is not at fault at all. Right now, the bill says unless a person is 50 percent at fault, and there is a defendant who can't pay, the person who picks up the tab is usually the injured person. What the committee is being asked to do is to decide what is the least unfair.

HEARING ON SB 29

Opening Statement by Sponsor:

SEN. TOM TOWE, SD 46, Billings. A BILL FOR AN ACT ENTITLED: "AN ACT INCREASING THE PENALTY FOR SEXUAL INTERCOURSE WITHOUT CONSENT WHEN TWO OR MORE OFFENDERS WERE INVOLVED; AND AMENDING SECTIONS 45-5-503 AND 46-18-231, MCA."

SEN. TOWE said this bill involves gang rape, where two or more persons are involved in the same victim's defense against the same victim. **EXHIBIT 3**

Proponents' Testimony:

Eliza Lake, Montana Women's Lobby, stated she solicits support for SB 29.

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses:

REP. BILL TASH said lines 14 and 15 on page 1 are not gender neutral and recommended they be changed accordingly. He also inquired about changing the $50,000 fine on page 2, line 3 to $100,000. **SEN. TOWE** said that the bill is being changed to gender neutral, and there are no plans to change the fine from $50,000 to $100,000, basically, because not many people have that kind of funds available.

REP. ANGELA RUSSELL asked **SEN. TOWE** if there are more of these cases in court. **SEN. TOWE** said he is not sure if there are more or fewer cases of gang rape, but the purpose of this bill is to deter any more from occurring. He said cases of date rape appear more in court than any other kind of rape. **REP. RUSSELL** also mentioned that due to the trauma of rape, many victims choose not to come to court to testify, and is there any way the courts can aid in getting the victims to testify? **SEN. TOWE** said that many rape victims can videotape their testimony so they don't have to present their case in court.

REP. RANDY VOGEL asked **SEN. TOWE** if he considered including "medical costs" after reasonable costs on page 2, line 24. **SEN. TOWE** suggested adding "and costs of" after reasonable costs.

Closing by Sponsor: None.

HEARING ON HB 121

Opening Statement by Sponsor:

REP. RUSSELL FAGG, HOUSE DISTRICT 89, Billings. A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING A GROSS NEGLIGENCE LIABILITY STANDARD FOR CERTAIN DAM OWNERS; EXTENDING THE LIABILITY STANDARDS TO CERTAIN DAMS IN ADDITION TO PERMITTED DAMS; EXTENDING THE LIABILITY STANDARDS TO NONFEDERAL DAMS ON FEDERAL PROPERTY; ESTABLISHING A PENALTY; AMENDING SECTIONS 85-15-107 AND 85-15-305, MCA; AND REPEALING SECTION 85-15-501, MCA."

REP. FAGG stated HB 121 tries to encourage the construction of dams. By saying that somebody moves underneath an existing dam, i.e. builds a house under an existing dam, and the dam fails, the person who moved underneath the dam would have to prove gross negligence on the part of the dam owner for the dam owner to be liable. In all other cases where the person was living under the dam before it was built, then it would be under regular negligence standards. **EXHIBIT 4**

CHAIRMAN FAGG introduced **Michael Kakuk, Staff Attorney, Water Policy Committee.** There are three issues of dam safety: 1) the acceptable degree of risk, public safety, and allocation of that risk; 2) developing a mailing list of 150 county commissioners, disaster emergency services personnel, high hazard dam owners and engineers involved in the design, structure and engineering of dams; and 3) public policy funding. The questions asked are what degree of risk is acceptable around a high hazard dam, and who should bear the burden of that risk. **EXHIBIT 5**

Proponents' Testimony:

Gary Fritz, Administrator, Water Resources Division, Department of Natural Resources and Conservation, stated the Department did participate in the effort that led to this legislation of the Water Policy Committee. The DNRC supports the intent of this legislation because people who move in below the high hazard dam know there are risks associated with doing so. This bill not only addresses dams that will be built, but it addresses the problem of existing dams as well.

Jo Bruner, Executor Director, Montana Water Resources Association. Ms. Bruner said the MWRA strongly supports the construction of feasible storage facilities as a necessary means to alleviate increasing needs and uses of water in Montana. The MWRA does not want to do away with gross negligence standards.

Opponents' Testimony:

Russell Hill, Executive Director, Montana Trial Lawyers Association. EXHIBIT 6

Jim Jensen, Montana Environmental Information Center. Mr. Jensen said that MEIC is concerned about the risks of high-hazard dams, although there is no control over the structure's construction. Too many innocent bystanders could be hurt. Most people who lose their home don't own them, and this is extremely costly.

Informational Testimony: None.

Questions From Committee Members and Responses:

REP. WYATT asked **Mr. Kakuk** with what funding these dams are built? **Mr. Kakuk** said that 40 percent are state owned and 60 percent are privately owned.

REP. BROWN asked **Laurence Siroky, Water Resources Division,** where a structure such as the Berkeley Pit in Butte stands under this legislation. He said the definition of a high hazard dam in the MCA codes, is "any dam or reservoir, the failure of which would cause the loss of life." The Pit is not a dam, but it could be defined as a reservoir. The definition of reservoir means "any valley, basin, cooley, ravine or other land area that contains 50 acre feet or more of impounded water measured at maximum, normal, operating pool." **REP. BROWN** assumes that 12 million gallons of acid water in the Berkeley Pit is over 50 acre feet. **Mr. Siroky** recommended the criteria that is used for a dam and this legislation is the following: over 50 acre foot and cost of life if it should fail. There is no classification for the Berkeley Pit in the bill.

REP. SMITH said the Warm Spring Ponds were built after the establishment of the surrounding, existing homesites. If these should overflow, are they considered high hazard structures?

Mr. Siroky said that if they should fail, under current statute, because they are high-hazard, people would be held to the higher liability standard if they built the structure after the ponds were built.

REP. BIRD asked **CHAIRMAN FAGG** who else is liable should there be a failure of the dam. **CHAIRMAN FAGG** said the engineers could be sued, or a third party complaint could be filed against the engineers.

REP. MCCULLOCH asked **CHAIRMAN FAGG** if there is a way to notify people who would like to move near a dam that may be impacted by this bill. **CHAIRMAN FAGG** said it's virtually impossible. It could be added to the land deeds, but that would be an overwhelming task.

REP. VOGEL asked **CHAIRMAN FAGG** on page 5, line 3, specifically, to define how far is "downstream." **CHAIR FAGG** said "downstream" is as far as the water goes that could cause a problem.

Closing by Sponsor:

CHAIRMAN FAGG closed by saying as long as more people move to Montana, we're going to have more people potentially moving below existing dams. Most dam owners do not provide insurance; it's very expensive. With a bill like this, there would be a better chance to buy insurance. Trial lawyers don't like this legislation because it adds a gross negligence standard to the Dam Safety Act. It is also true that downstream owners who have moved below a dam will have reduced property values, but that makes sense because they are moving to a potentially dangerous situation. Addressing **REP. BROWN'S** concern about the Berkeley Pit, there is no intention of adding the Berkeley Pit to this bill, and perhaps, an appropriate amendment can be drafted to exempt the Berkeley Pit.

HEARING ON HB 258

Opening Statement by Sponsor:

HOWARD TOOLE, HD 60, Missoula. A BILL FOR AN ACT ENTITLED: "AN ACT EXCLUDING FROM THE INTERIM EARNINGS DEDUCTION IN A SUCCESSFUL WRONGFUL DISCHARGE SUIT AN AMOUNT EQUAL TO THE COSTS OF OBTAINING OR RELOCATING TO NEW EMPLOYMENT; AND AMENDING SECTION 39-2-905, MCA."

HB 258 addresses the Wrongful Discharge Act. Section 1 in the bill is part of the Act, and it's the section of the Act that sets forth how much a person can collect in terms of damages in these types of cases. The entire section says that someone who has been lawfully terminated is limited to being awarded loss of wages for a period of four years on the date of discharge. What

this bill is attempting to do is to clarify exactly how much of the damages a person can get, and it addresses the amount expended by an employee for searching for employment.

Proponents' Testimony:

Gary Spaeth, Liability Coalition, stated the Wrongful Discharge Act was put together in 1987 and the work search which started out as two years is now four years. Termination is a very serious matter for an employee and because of that, the Coalition suggests that this bill be amended to allow and limit the deductions for the first year. The reason for doing this is to encourage the employee to go out and seek work in that first year of time.

David Owen, Montana Chamber of Commerce, declared Montana has a long history of wrongful discharge. The employers that **Mr. Owen** represents are hesitant to tamper with this section of the law, but consequently, it is a fair and reasonable bill.

Opponents' Testimony: None.

Informational Testimony: None.

Questions From Committee Members and Responses:

REP. MCCULLOCH asked what happens if a person doesn't find a job within the first year, and if the possibility that the decision of wrongful discharge doesn't happen within that first year, is this going to exclude people from looking for work? **Mr. Spaeth** said not if they are suspended after the first year. The money will be extended to eighteen months. For the committee's information, **CHAIRMAN FAGG** told **REP. TOOLE** about the amendment and that it will be discussed during executive action. He asked **Mr. Spaeth**, Mr. Owen and **REP. TOOLE** to try to come to an agreement on the amendment.

Closing by Sponsor: None.

ADJOURNMENT

Adjournment: 11:00 a.m.

Russell C. Fagg
RUSSELL FAGG, Chair

Beth Miksche
BETH MIKSCHE, Secretary

RF/bcm

HOUSE OF REPRESENTATIVES

Judiciary COMMITTEE

ROLL CALL DATE 1-29-93

NAME	PRESENT	ABSENT	EXCUSED
Rep. Russ Fagg, Chairman	✓		
Rep. Randy Vogel, Vice-Chair	✓		
Rep. Dave Brown, Vice-Chair	✓		
Rep. Jodi Bird	✓		
Rep. Ellen Bergman	✓		
Rep. Vivian Brooke	✓		
Rep. Bob Clark	✓		
Rep. Duane Grimes	✓		
Rep. Scott McCulloch	✓		
Rep. Jim Rice	✓		
Rep. Angela Russell	✓		
Rep. Tim Savles	✓		
Rep. Liz Smith	✓		
Rep. Bill Tash	✓		
Rep. Howard Toole	✓		
Rep. Tim Whalen	✓		
Rep. Karyl Winslow		✓	
Rep. Diana Wyatt	✓		

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EXHIBIT 1
DATE 1-29-93
HB 282

Montana Trial Lawyers ASSOCIATION

Executive Office
#1 Last Chance Gulch
Helena, Montana 59601
Tel: 443-3124

January 29, 1993

Rep. Russell Fagg, Chair
House Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: HB 282

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's support for HB 282, which reduces the threshold for joint-and-several liability to 10 percent and apportions negligence only among parties to a lawsuit. MTLA supports the bill for several reasons:

1. Contrary to notions that joint-and-several liability is the recent brainchild of American trial lawyers, the doctrine reflects fundamental concepts of justice at the root of Western civilization. Two thousand years ago, Jewish law described a case where one ox killed another by pushing it into a dangerous pit. The owner of the dead ox made claims against both the owner of the misbehaving ox and the owner of the pit, and the Talmud quotes a judge named Nathan the Babylonian:

> When no payment can be made from one party, it has to be made up from the other party . . . [T]he owner of the damaged ox is entitled to say to the owner of the pit, 'I have found my ox in your pit; whatever is not paid to me by your co-defendant must be made up by you.'--Bava Kamma, 13a.

2. There are only three ways to treat the losses of injured victims. Either the victim bears the burden of those losses, or society contributes through government assistance, or wrongdoers pay for the injuries they cause. The first alternative is inhumane. The second requires taxpayers to subsidize not just wrongdoers but also an administrative bureaucracy. The third not only compensates losses efficiently and fairly--it also deters future wrongdoing.

3. Joint-and-several liability only affects defendants when, regardless of their percentage of fault, the injury would not have occurred except for their conduct. Plaintiffs who contribute to their own injuries can never recover the full costs of their injuries from any defendant, even under joint-and-several liability, because they absorb the portion of costs attributable to their own fault.

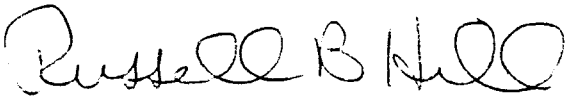
4. Insurance companies claim that joint-and-several liability raises some premiums, such as those paid by corporations, governments, and professionals for liability insurance. But in fact surprisingly few defendants ever pay more than their proportional share of damages because of joint-and-several liability. For example, the Minnesota Justice Foundation studied the impact of joint-and-several liability in that state between 1982 and 1987 and discovered that only 77 of 1,127 jury verdicts during that six-year period assigned fault to more than one defendant, and in only 15 of those did defendants actually have to pay more than their share of fault.

5. On the other hand, limiting the doctrine of joint-and-several liability raises the premiums paid by thousands of Montanans who purchase uninsured and underinsured motorist coverage to protect themselves against insolvent drivers. To the extent that victims cannot reach beyond an insolvent defendant to recover their damages, they must pay more to insure themselves against the wrongdoing of others. And the same shift in costs from guilty defendants to an innocent public occurs in environmental cases: Citizens threatened by toxic landfills, for example, can rarely prove precisely which of dozens of companies over dozens of years is responsible for cleanup. That's why William K. Reilly, head of the EPA during the Bush Administration, testified before a Senate Superfund committee that joint-and-several liability encourages cleanups and responsible waste management practices.

6. Finally, current Montana law encourages litigation and discourages settlements. Since defendants can lower their costs by blaming anyone, including non-parties, they do. Since plaintiffs cannot hope to defend "empty chairs" from such blame-shifting, they must sue anyone who could conceivably be at fault and they resist settling with individual defendants. HB 282 would correct this problem.

Thank you for considering these comments. If I can provide additional information or assistance, please contact me.

With best regards,



Russell B. Hill
Executive Director

EXHIBIT 1
DATE 1/29/93
HB 282

MONTANA JOINT & SEVERABILITY LAW

FAIRNESS NEEDS TO BE RESTORED

What is Joint and Several Liability? Where the acts of more than one wrongdoer (defendants) combine to cause harm to a person, the injured person may collect the full amount of his or her damages from any wrongdoer.

An Example of Joint and Several Liability: Two vehicles crash into the plaintiff's car and cause serious injuries. After hearing all of the facts, the jury decides that the first defendant is 40% at fault and the second defendant is 60% at fault. Joint and several liability would permit the plaintiff to collect all of his damages from either wrongdoer.

The Public Policy Behind Pure Joint and Several Liability: Why should one wrongdoer have to pay more than his or her actual share of damages as determined by a jury? Because the other possible choices are even worse. When one of the wrongdoers is unable to pay for damages he or she caused to a person, there are three choices for who should bear the portion of the loss: (1) The injured victim; (2) society; or (3) the other wrongdoer. As between the innocent injured person or the other wrongdoer, it is more fair that a wrongdoer bear the loss. As between having society bear the loss through taxes, or the other wrongdoer, it is more fair that the wrongdoer bear the loss.

What Protection does a Wrongdoer Have Under Pure Joint and Several Liability That he Will Not Have to Pay More Than His Portion of Damages? Even with pure joint and several liability, a wrongdoer has legal remedies so that he or she will usually not have to pay more than his or her actual fair share. First, under Montana law no wrongdoer will be liable for any damages unless a plaintiff can prove that the wrongdoer's fault was a substantial factor (legal cause) in causing the plaintiff's injuries. Secondly, one wrongdoer can sue the other wrongdoer for contribution. Contribution would be the pro rata share according to each wrongdoer's percentage of fault.

What if the Plaintiff is Also Partly at Fault? Montana law provides that if a plaintiff is partly at fault, then the plaintiff's percentage of fault is subtracted off the top of any verdict of damages. For example, if the plaintiff is 10% at fault, damages are reduced by 10% before the payment of the defendants is even considered.

In addition, if a plaintiff is more than 50% at fault, he or she cannot recover at all.

Why the 1987 Changes to Montana's Joint and Several Liability Law Should be Abolished or at Least Fine Tuned:
All risks and burdens have been shifted to the victim or society and away from wrongdoers. The 1987 revision of joint and several liability law went way too far. Its intent was to protect wrongdoers who were only marginally at fault from having to pay more than their share. In theory, that sounds good. However, in practice, it has resulted in totally innocent victims being unable to recover significant portions of their damages from wrongdoers who are substantial factors in causing those injuries. Society, i.e. taxpayers, has to pick up the tab when such catastrophic injuries leave victims destitute. The responsibility for those injuries should lie in the persons causing them, i.e. the wrongdoers.

When Defendants Don't Pay and Victims Can't, Taxpayers Do:
Serious personal injury cases involve significant medical and related expenses. When the victim can't pay, and the defendants aren't required to fully compensate for injuries, the uncompensated costs of care are usually born by society, in other words, by you and me as taxpayers, or charities.

The 1987 Changes Create an Incentive to Sue More People: If a Plaintiff settles with one of several defendants for an amount which is a lower proportion than what a jury ultimately decides that defendant should pay, the difference will be uncollectible by the plaintiff. The economic risks of settling with a single defendant falls on the injured victim. It is a practical impossibility for plaintiffs to defend individuals or entities they have not even named in a lawsuit and who are not there to defend themselves. Therefore, plaintiffs tend to decrease this risk by suing any entity which could conceivably be found to have contributed to the injury. This increases the likelihood that hospitals, doctors, governmental entities and businesses will be named as defendants more often. When the injured victim is forced to sue so-called "empty chairs," he is forced to expand the litigation to fill the chairs.

An Example of Injustice Under the Present Laws: A five year old child is placed in a home for adoption where one of the foster parents has a history of child abuse. The child is abused over a six month period and is finally severely brain damaged. Before the severe injury, a neighbor had called the private agency responsible for the placement of the child several times to report the abuse, but the agency did nothing. A private counselor, who was initially hired by the agency to interview the parents, failed to take an adequate history and therefore did not obtain prior psychiatric records which would have disclosed the abuse. The child was seen by numerous physicians and hospitals over the course of the six months. It is conceivable that the abuse should have been discovered by the health care providers.

Under this scenario, the primary responsibility is very probably with the adoption agency, which did not follow up on reports of abuse, and the counselor, who was negligent in screening the foster parents. However, the plaintiff will be forced to name as defendants numerous doctors, hospitals and emergency room staff who could be conceivably partly at fault for failing to discover the abuse.

At trial, perhaps a jury finds that the hospital staff and doctors are not a substantial factor and return verdicts in their favor. Nevertheless, they had to endure the trial when they probably shouldn't have been named defendants at all. The jury allocates fault between the private adoption agency and the counselor--65% for the counselor and 35% for the adoption agency. The counselor has no insurance; the private agency has insurance. Under the present statute, even though the private agency may have been negligent (even grossly negligent) and a substantial factor in causing the injuries to a totally innocent victim, it is the victim who will have to bear 65% of her damages. The counselor is unable to pay anything. The private agency walks away with only having to pay 35% of the damages. If the victim is institutionalized, it may be the taxpayers of Montana who will have to shoulder the remainder of the damages to the victim. The injustice of this law is manifest.

The Solution:

(1) The best solution would be to abolish the changes made in 1987 to the joint and several liability statutes. We should go back to the joint and severable laws that our country had for the prior 100 or more years. Wrongdoers could still sue each other to obtain contribution when another wrongdoer can pay and be forced to shoulder the full amount of damages as between themselves and the innocent victim when another defendant is insolvent.

(2) A more modest solution would be to amend the statute to protect wrongdoers who are truly only marginally at fault, i.e. less than 10% at fault. This is a solution offered by a commentator who reviewed the statute and wrote a law review article for the Montana Law Review. See Richardson, Montana Law Review 197, 1989.

(3) An even more modest solution would be to allow the 1987 amendment to stay in place and to require any defendant who is named as a party to fill any empty seats with persons he thinks are also partly to blame before the trial begins. Further, while ordinarily each defendant would only have to pay his portion of the damages, if a plaintiff can show that another defendant is unable to pay his portion, the court can order a wrongdoer to pay the entire amount.

EXHIBIT 2
DATE 1-29-93
SB HB 282

DEPARTMENT OF ADMINISTRATION

RISK MANAGEMENT AND TORT DEFENSE DIVISION

STAN STEPHENS, GOVERNOR

MITCHELL BLDG., ROOM 111

STATE OF MONTANA

TELEPHONE (406) 444-2421
FAX (406) 444-2812

HELENA, MONTANA 59620

January 27, 1993

TESTIMONY IN OPPOSITION TO HB 282, by Bill Gianoulias, Chief Defense Counsel, Risk Management and Tort Defense Division, Department of Administration.

The Risk Management and Tort Defense Division opposes HB 282 because it is fundamentally unfair to require a defendant to pay more than its share of damages. The statute as it is strikes an equitable balance among claimants and defendants.

The effect of this bill works a particular hardship on governmental entities because they are often targets of lawsuits even when their negligence is minimal. Governmental entities are seen as having unlimited resources and will be sued when other defendants with limited resources will not. Additionally, the incentive is created for a plaintiff to settle with a defendant primarily at fault but with limited resources and to pursue the governmental entity.

A plaintiff's recovery is not barred unless his negligence is greater than the combined negligence of all against whom recovery is sought. Under this bill, a plaintiff 40% at fault will recover 60% of his damages from the state found 11% at fault when the defendant 49% at fault is insolvent. Plaintiff, four times more responsible for his injury than the state, will recover most of his damages from the minimally-at-fault state.

Another effect of this bill is to require a defendant determined to be 10% at fault to pay 100% of the damages if another defendant, 90% at fault, is insolvent. The current statute strikes the best balance between a plaintiff's right to recover and a defendant's responsibility to pay for its own wrongdoing.

This bill also eliminates the requirement that the trier of fact apportion negligence among the parties whose action contributed to the injury. Plaintiffs are encouraged to settle with defendants who bear a higher percentage of fault, but have minimal resources, and proceed to trial against deep pocket but minimally negligent defendants. The trier of fact will be left to determine fault with an incomplete view of the actions which contributed to the injury.

Do not pass HB 282.

EXHIBIT #3
DATE 1-29-93
SB 29

Bob Court
2909 Breick Lane
Billings, Mont
59105

Legislative Council
State Capitol
Helena. Mont. 59620
Re: Bill Drafting Request

Ladies And Gentlemen:

I have asked Mr. Tomas Towe to submit a bill to you in regard to the crime of gang rape. I feel at this time that the ~~law~~ is not sufficiently strong enough to deter gang rape at this time.
I would come to Helena testify and answer any questions on my strong beliefs in this matter except I am on dialysis, and oxygen here in Billings and also being on fixed income it is impossible for me to travel outside of Billings.
Please note communications to you dated Oct 30, 1991 and enclosure copy of the bill as written up by Mr. Towe.
My interest is on lines 9 through 14. I would also like to see submitted in this language a no parole entrance for the first 5 years.
My reasons for such a strong bill are many, but will shorten it up to say the no matter what the reputation or lifestyle of a lady, or her social standing, there is no reason for more than one person to rape her for sexual pleasure knowing that the law will go easy on those convicted of this crime. I feel this is animal behavior and should come to a stop. I bore witness to a gang rape in 1957 and when this crime came to court the rapist got off with just a small fine and it was ruled that boys will be boys and the lady was just Carny Trash. I was awarded damages for being beaten to the point I was hospitalized. She was not even given this benefit. I am asking that this bill be given consideration and passed as drafted
Respectfully

Bob Court

R.W. (Bob) Court

EXHIBIT 4
DATE 1-29-93
HB 121

TESTIMONY OF THE
DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
ON HOUSE BILL 121, FIRST READING

BEFORE THE HOUSE JUDICIARY COMMITTEE

JANUARY 29, 1992

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING A GROSS NEGLIGENCE LIABILITY STANDARD FOR CERTAIN DAM OWNERS; EXTENDING THE LIABILITY STANDARDS TO CERTAIN DAMS IN ADDITION TO PERMITTED DAMS; EXTENDING THE LIABILITY STANDARDS TO NONFEDERAL DAMS ON FEDERAL PROPERTY; ESTABLISHING A PENALTY; AMENDING SECTIONS 85-15-107 AND 85-15-305, MCA; AND REPEALING SECTION 85-15-501, MCA."

The Department of Natural Resources and Conservation (DNRC) supports House Bill 121. It is the result of a thorough review of Montana's laws and regulations concerning the safety of dams by the Legislative Water Policy Committee. The DNRC participated in that review and concurs with the Water Policy Committee proposal.

This bill addresses the fact that little precedent has been established in the courts regarding the liability standard to be applied to owners of dams in Montana. Further, the Montana Dam Safety Act only establishes a ***negligence*** liability standard for dams having operating permits from the DNRC. As such, it falls short in addressing many Montana dams since operating permits are issued only on high-hazard dams -- those larger than 50 acre-feet ***and*** where the loss of life is likely if the structure should fail.

The Dam Safety Act was passed with this liability "*carrot*" as an incentive to high-hazard dam owners to obtain operating permits. House Bill 121 proposes to extend this "*carrot*" to other types of dams as a means to better assure their safety. More specifically, it would apply a ***negligence*** liability standard to dams constructed, operated, and maintained under the supervision of an engineer, including private dams located on federal land.

This legislation also deals with the liability situation created when a landowner places a home or other structure downstream of an ***existing*** dam. Other states have wrestled with this encroachment problem which is certainly not unique to Montana. A few have provided powers to local governments to zone areas below an existing dam to exclude homes or to deny subdivisions of land below a dam. In contrast, House Bill 121 provides that, if such a dam subsequently fails, the downstream landowner must prove that the dam owner was ***grossly*** negligent before the dam owner can be found liable for

any damages. Under current law, if homes or other structures are placed below an existing dam, it results in the dam being classified as high-hazard and requires the dam owner to comply with established minimum state standards of configuration, operation, and maintenance. The proposed legislation serves to balance the increased cost to a dam owner of assuring the safety of a dam that, absent the new homes or structures, would not be subject to such costs.

EXHIBIT 5
DATE 1-29-93
~~SB~~ HB 121

Amendments to House Bill No. 121
First Reading Copy

Requested by Rep. Fagg
For the Committee on Natural Resources

Prepared by Michael S. Kakuk
January 15, 1993

1. Page 4, line 13.
Following: "failure" on line 12
Strike: "or rupture"

2. Page 4, line 16.
Following: "and"
Strike: "regularly"
Insert: "properly"

3. Page 5, line 2.
Following: "death"
Insert: "resulting from flows of water from failure of the dam or reservoir"

4. Page 5, line 8.
Following: "and"
Strike: "regularly"
Insert: "properly"

EXHIBIT #6
DATE 1-29-93
SB HB 121

Montana Trial Lawyers ASSOCIATION

Executive Office
#1 Last Chance Gulch
Helena, Montana 59601
Tel: 443-3124

January 29, 1993

Rep. Russell Fagg, Chair
House Judiciary Committee
Room 325, State Capitol
Helena, MT 59624

RE: HB 121

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to HB 121, which relaxes the standards of liability applicable to owners of high-hazard dams in Montana. MTLA opposes HB 121 because of several concerns:

1. Although the Water Policy Committee recommended a gross-negligence standard be applied only to victims who "encroach" upon an existing dam, HB 121 applies a gross-negligence standard indiscriminately. The bill extends far beyond the victim who, by locating downstream from an existing non-high-hazard dam, creates for the first time the potential for loss of human life and thus transforms that dam into a high-hazard dam. The bill extends even beyond victims who knowingly locate below existing high-hazard dams. In fact, as the diagram on page 4 of this testimony illustrates, the bill applies a gross-negligence standard to victims who are completely irrelevant to the high-hazard status of dams.

2. Upon the bill's effective date, owners of existing dams will be no less liable for negligence than they were a day earlier. Moreover, any dam constructed after the bill's effective date will still entail dam-owner liability to all existing property owners for negligence. And the engineers, contractors, consultants and similar entities which build dams for dam owners gain no liability protection whatsoever from HB 121. Faced with the same exposure to liability, no insurance company will lower its liability premiums--even if additional liability exposure is limited to gross negligence. Not surprisingly, the State of Montana--

which owns a quarter of all high-hazard dams--predicts that HB 121 will have no fiscal impact on expenditures (self-insurance, claims, etc.).

3. HB 121 leaves the interpretation of dam "failure" (page 4, line 20; page 4, line 25) to Montana courts and, by doing so, may actually subject dam owners to more, not less, liability. Current law already distinguishes between failure and rupture of a dam (Sec. 85-15-305(1), MCA), and the structural "failure" of a dam apparently differs from the operational failure of a dam owner. Consequently, a dam owner who is only liable now for negligently allowing flows of impounded water exceeding the 100-year floodplain may, under HB 121, become strictly liable for any flows of impounded water which are due to some cause other than dam "failure."

4. HB 121 leaves the interpretation of "downstream" (page 5, line 1; page 5, line 3) to Montana courts and, by doing so, may actually subject dam owners to more, not less, liability. In the diagram attached as page 4 of this testimony, cabins A, B, and C are all located downstream from the dam. But HB 121 apparently treats the person who "placed" cabin A outside the projected flood area no differently than the person who "placed" cabin B within the hydraulic shadow and the person who "placed" cabin C within the 100-year floodplain. A court forced to distinguish between the three, and also faced with HB 121's emphasis on the risks willingly accepted by victims, would likely apply "downstream" to only to cabin C and the well-publicized 100-year floodplain.

5. Because its provisions are vague and inconsistent, HB 121 will dramatically increase the litigation resulting from dam-related injuries or property damage. The bill, for example, leaves Montana courts to determine whether victims were injured "as a result of a structure being placed downstream of an existing dam" (page 5, line 4)--an enormously subjective determination, especially in the context of a bill which relies on the willing acceptance of risks by those victims, and especially since "structures" includes highways, stores, parks, campgrounds, and similar facilities designed to attract transient populations. Because a quarter of Montana's high-hazard dams are state-owned, and because the state's maximum liability is limited to $1.5 million, HB 121 will also force citizens victimized by a state-owned dam to divide a single sum while proving different degrees of fault.

6. HB 121 violates constitutional principles of equal protection if it discriminates irrationally between victims who "place" a "structure" before the construction of a high-hazard dam and victims who "place" a "structure" below an existing high-hazard dam, even though both categories of victim produce identical results vis a vis dam owners. HB 121 also violates constitutional principles of equal protection if it irrationally discriminates between victims who "place" a "structure" below an existing high-hazard dam before the bill's effective date and victims who do so after the bill's effective date, even though both categories of victims produce identical results vis a vis dam owners. And there is no rational possibility that HB 121, by introducing such discrimination, will contribute to lower liability premiums or new construction of dams.

7. HB 121, by unilaterally shifting the financial risks of negligence from dam owners to current property owners, would reduce the value of downstream

property owners. In this regard, note the complaints of dam owners that the mere connotations of the term "high-hazard" scare away potential buyers.

More than 80 high-hazard dams in Montana face a July 1, 1995, deadline for meeting safety standards. The projected cost of rehabilitating state-owned dams alone exceeds $200 million. Few current owners of high-hazard dams insure the actual risks those dams pose. The Water Policy Committee publicly worried about the apparent inability of DNRC to enforce inspection requirements. Current DNRC policies tolerate substandard spillways. Alerted by these warning signs, and confronted by dam owners who seek to insulate themselves from liability for negligence, this committee should demand clear objectives and precise language from the proponents of HB 121. MTLA believes that the bill needs more of both.

Thank you for considering these comments. If I can provide additional information or assistance, please notify me.

Respectfully,

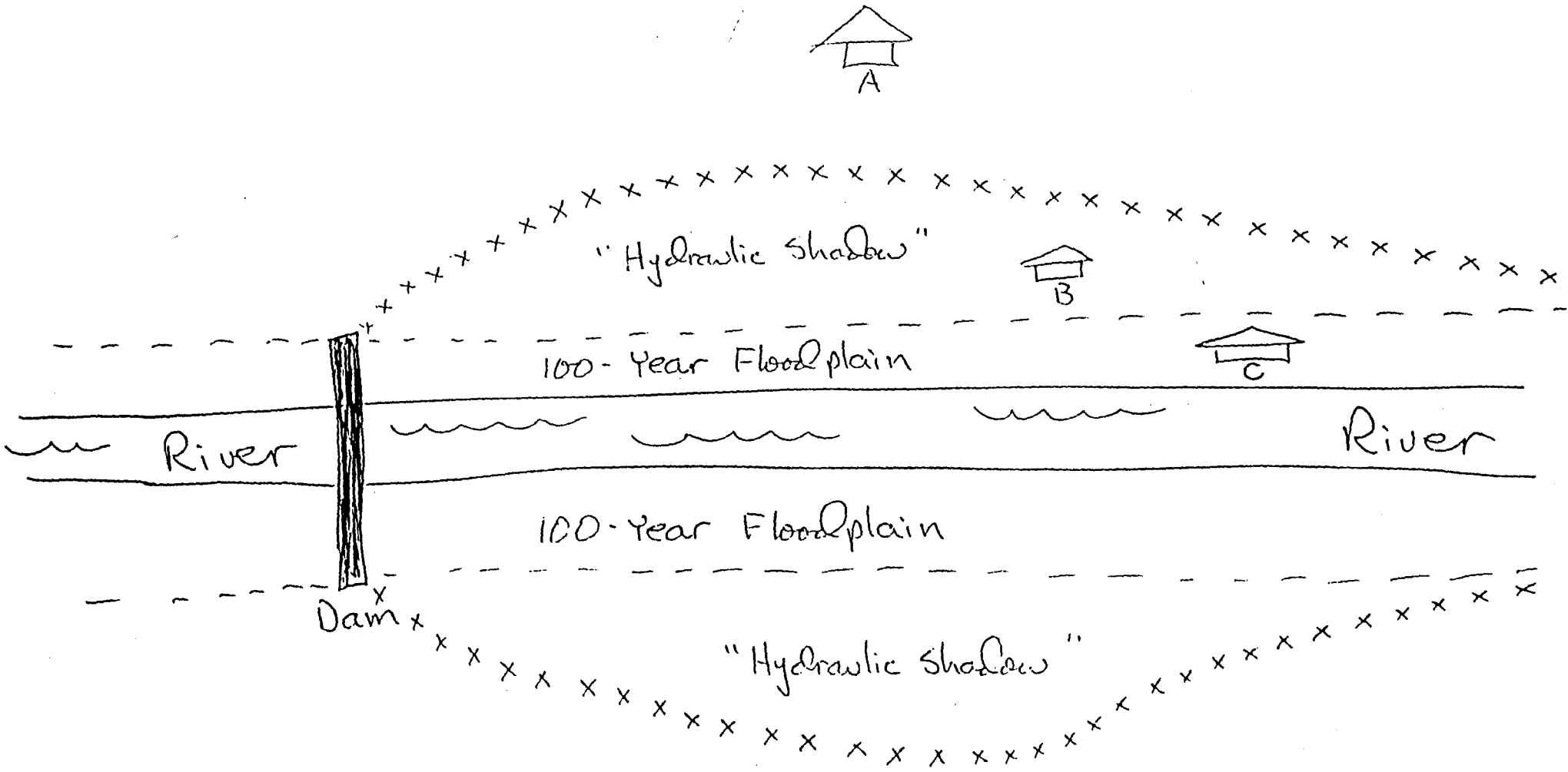
Russell B. Hill

Russell B. Hill
Executive Director

EXHIBIT 6
DATE 1/29/93
HB 121

EXHIBIT 6
DATE 1/29/93
HB 121

"Downstream"



HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Judiciary COMMITTEE BILL NO. HB 28

DATE Jan. 29, 1993 SPONSOR(S) Wheden

PLEASE PRINT PLEASE PRINT PLEASE PRINT

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Gary Spaeth	Liability Coalition		X
GENE PHILLIPS	NAII		X
J. LENMARK	AIA		X
ROBERT WOOD	CITY OF HELENA		X
David Owen	MT chamber of commerce		✓
Brian Tios	MT. Medical Assn		X
John Fitzpatrick	Pegasus Gold Corp		X
Greg Van Horssen	State Farm Ins.		X
J.D. Lynch	MT Chamber		✓
DAL WHYTE	STILLWATER MINING		X
Jerry Loendorf	Pub. Med Assn		✓
John Alke	Mont Defense Trial Lawyers		✓
Joe Bottomly		✓	
Bill Grandstaff + Brad Dahl	RMTD - DOR	~~✓~~	X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

Bruce W. Meyer	MSBA		X
Alec Hansen	AMTC		X
Pat Tohill	FIC		X

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Judiciary COMMITTEE BILL NO. HB 282

DATE 1/29/93 SPONSOR(S) REP. WHALEN

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Steve Turkiewicz	Mt. Auto Dealers Assn		✓
Ken Williams	MPC/Entech		✓
DAN WALKER	US WEST		✓
Mona Jamison	The Doctors' Company		✓
Carl Schweitzer	Mont Coal Assoc		—
Russ Ritter	Washington Corp		✓
Roger McGlenn	INDEPENDENT INS. AGENTS ASSOC. OF MT		✓
Tom McNab	Montana Technical Council		✓
Russell B Hill	MTLA	✓	

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HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Judiciary COMMITTEE BILL NO. HB 12

DATE Jan. 29, 1993 SPONSOR(S) R. Fagg

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
GARY FRITZ	DNRC	X	
Michael S. KAKUK	Water Policy Comm. Staff	INFO ONLY	
Jim Jensen	MEIC		X
Russell B Hill	MTLA		X

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HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Judiciary COMMITTEE BILL NO. SB # 29

DATE Jan. 29, 1993 SPONSOR(S) Towe

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Eliza Lake	MT Women's Lobby	X	

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HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Judiciary COMMITTEE BILL NO. HB 258

DATE Jan. 29, 1993 SPONSOR(S) Toole

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Gary Spaeth	Liability Coalition	X	
David Owen	MT Chamber of Commerce	X	
Don Waldron	MT Rural Ed Assn.		—
Bruce W. Nicholas	MSBA		X

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.