MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **ACTING CHAIRMAN REINY JABS**, on January 31, 1995, at 10:00 A.M.

ROLL CALL

Members Present:

Sen. Bruce D. Crippen, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Lorents Grosfield (R)
Sen. Ric Holden (R)
Sen. Reiny Jabs (R)
Sen. Sue Bartlett (D)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Valencia Lane, Legislative Council
Judy Feland, Committee Secretary

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

Committee Business Summary:

Hearing: SB 200, SB 132
Executive Action: None.

HEARING ON SB 200

Opening Statement by Sponsor:

SENATOR J.D. LYNCH, Senate District 19 of Butte, sponsored SB 200. The bill involves banks, lenders and borrowers as well. He said the amendments as proposed by the Department of Health **(EXHIBIT 1)** are acceptable to him. He said there was a problem in our state primarily as a result of a case in his area where a pole plant borrowed quite a bit of money from a local bank and it was later determined that the plant was on ground that needed cleaning up. ARCO, who was formerly involved, decided that the lender who had lent the money to the plant that had been there for years, should also be a potential responsible party. They

were exercising the deep pocket theory in looking for the lender to be responsible for some of the clean up involved. The lender settled for perhaps several hundreds of thousands of dollars plus legal fees of about the same. The small bank was, of course, sorely strapped because of this. The lenders around the state are extremely reluctant to lend money to someone who might potentially be on ground that is not pure. He said he was thinking of small towns with former small gas stations with tanks underneath. He said it would be a problem if a person owned the lot and wanted to move the tanks and improve the lot. When he went to the bank for that loan, there would be a question if the bank was responsible if they lent that money. He likened this to loaning money for a friend to buy an automobile, and the auto was involved in an accident, he would be responsible when in fact, he had no interest in the situation outside of the loan. Should a legitimate lender who had nothing to do with the business be responsible for what is beyond their control? This bill says, "no." It is not the responsibility of the lender. He explained that it was a borrowers' bill because in many cases the lenders are stopping the loaning of money in these situations because they are not going to be caught up, not should they be, if they are responsible to their stockholders. He said the bill was about cleaning up our lot and to conform it to the federal standards.

Proponents' Testimony:

Frank Crowley, attorney, representing the Montana Bankers Association, said he had worked for the past several weeks helping **SENATOR LYNCH** to draft the bill that would clarify the so called, "secured creditor exemption" under Montana's many-superfund law. He presented a fact sheet for the committee shown as **(EXHIBIT 2).** It explains that this bill conforms parts of Montana's law (CECRA), Comprehensive Environmental Cleanup and Responsibility Act, to the analogous provisions of the Federal Superfund Law (CERCLA), Comprehensive Environmental Response, Compensation, and Liability Act. He read from the document explaining the indicia of ownership. There have been substantial debates about what it means to hold indicia, he said. As a result of several court decisions and confusion at the federal level, the EPA launched a very long, very productive process which resulted in the adoption of a lender liability rule in 1992 that attempts to define for everyone what it means to be a secured creditor to get yourself out of potential liability under CECRA. What the bill attempts to say that the State of Montana, which has a verbatim version of the secured creditor exemptions, means and intends that the scope of that intention is the same under our law as it is under federal law. He referred to Page 8 and 9 of the bill, where he said 90 per cent of the language to be inserted in the statute will be found. He said it is a list of specific activities that lenders engage in, without being deemed to participate in the management of a facility. It also says that if the bank would get involved and engage in the operation on a day-to-day basis, they lose the exemption, which

matches federal language, he said. After the bill was drafted, he said that the Montana Bankers Association requested a meeting with the State Department of Health because DHES administers this statute and oversee site clean-up in the state. He said they had two productive meetings with Director Robinson and Bill Kirley, who is the staff attorney with the CECRA. As a result, he proposed an amendment sheet **(EXHIBIT 3)** which meets the department's needs for some clarification and housekeeping changes. They don't affect the intent of the bill very much, he said. He referred to 23 and 24 which relate to statutes of limitations. There was some concern that the CECRA limitations were the same as the federal. There is some room for ambiguity, he said.

Bruce Gerlock, president of the Montana Independent Bankers Association, and senior vice-president of the First Security Bank in Bozeman, asked the committee to support SB 200. The MIBA represents 47 community banks and federal savings banks throughout Montana. The independent bankers, in locally owned and operated banks, want to help businesses in their communities, he said. They believe in local businesses that provide jobs and pay taxes, however, up to this point,he said, those business concerns that dealt with environmentally-related products were pretty much left out of the credit-granting cycle. If not left out, he explained, those businesses were compelled to prove to the lenders that the businesses were environmentally clean, because the lender was potentially liable for any clean-up costs should the loan go into default and the lender take possession of the property involved. The lender would become part of the chair of title. The lender was perceived to have deep pockets and could afford the remedial action moreso than any of the previous owners. Bankers become nervous over the potential liability and simply avoid those type of business loans. Why should they take the risk, he asked? Why jeopardize the bank and the stockholders? This course of action was no good for those small businessmen wanting to operate those environmentally-related businesses whether that be gas stations, paint stores or bulk distributors. Those small businesses need credit for expansion, equipment and operating like any other business, he said. SB 200 would offer the exemption from liability lenders need to help those affected small business concerns. The MIBA strongly supports SB 200, **Mr. Gerlock** said. They believe that granting credit to environmentally-related businesses is possible because the exemption offered to secured creditors who take real property to protect the security interest and do not participate in its management. The bill is good for community bankers which also means that it is good for small business and local communities.

J. Edward O'Neill, Senior vice-president and Senior lender at Valley Bank and Helena, said that his firm is a locally owned community bank. He spoke in favor of the proposed legislation. It was important to clarify and standardize both the federal and state legislation, he said, because of the confusion and confusion lends itself to fear to both banks and borrowers. He

said a community customer wanted to borrow money to re-finance his building in downtown Helena. In the normal course of business, **Mr. O'Neill** requested an appraisal which was returned with the note that there was an "apparent existence of underground storage tanks." Red flags popped out to everyone concerned. They had proposed a SBA guaranteed loan and the SBA requested that both the EPQA and the DHES sign off of what was, in fact, acceptable collateral. So the were dealing with three separate agencies and their concerns were multiplied. The business was forced to utilize two separate attorneys and an engineering firm who had to investigate the laws and had to consult with different agencies regarding the difference involved in the rules. They finally got the SBA to agree with the legal research that was done and made the loan, but not before the borrower was exposed to a lot of legal expenses and time delays. He ultimately ended up losing the interest rate as well because the rates moved during the course of the approval and final approval. **Mr. O'Neill** recommended a Do Pass vote on this bill which would not only benefit bankers, but also commercial operations on Main Street in Helena and across Montana.

Tim Gill, President of Montana Livestock Agriculture Credit, Inc., said that his organization was a statewide agency lender based in Helena. They do support the bill, he said, because it has directly affected some of the financial requests they handled in recent years. Their small independent company could not afford the resources to do in-depth investigations beyond the standards of appraisals and any significant environmental liability means that their company has to back away from the loan immediately. They also represent several out-of-state insurance companies or help their customers access them for ranch and real estate loans. In many cases, he said, they decline to use a piece of property for a variety of reasons, all the way down to the fact that a transformer has some PCB's or maybe an old garbage dump is causing concern or one pesticide bucket in the wrong place. He asked for support on the bill.

Ronna Alexander, representing the Montana Petroleum Marketers Association, which, she said, are the wholesalers and distributors of petroleum products in Montana. There are currently 115 members in the association, and in addition to the bulk operations, most of them also own retain locations. About seventy per cent of the underground storage tanks in Montana are owned by this tier of the industry. Lender liability had become a critical issue to these independent business people. In 1988 federal EPA regulations went into effect that regulated the up-grade, removal, and replacement of these underground tanks over a 10-year period with the final deadline of 1998 for those that own fewer than 10 tanks. At the time the EPA promulgated these rules, their own predictions were that 75 percent of all rural gas stations in the country would close because of the expenditures involved. Coupled with that, there has been the problem of obtaining loans in order to upgrade these gas stations, not because of their inability to service the debt, but

because the lending institutions have been very reluctant to become involved in these properties where contamination might occur and require expensive clean-up. She said that their organization had been working on this issue on the national level for several years to no avail, and so for Montana to revise their secured credit language would benefit these and all parties involved. She urged positive consideration of SB 200.

Don Hutchinson, representing the Department of Commerce, Financial Division, spoke in support of the bill. As the state's financial commissioner, he was concerned with the safety and soundness of the 156 financial institutions in Montana. As it now stands, CERCLA potentially puts at risk the soundness of every lender and the safety of those institutions, he said. Many lenders could be rendered insolvent under these circumstances. When insolvency occurs, the federal government will end up paying the clean-up costs with FDIC dollars rather than the Superfund dollars and the community institutions will be destroyed. This legislation will remedy this problem, he said. CERCLA's goal is to make this country an environmentally safer place to live. Under the law, he said, his responsibility was to assure the safety of the depositors' funds in state-charged financial institutions with the State of Montana by examining and regulating them for soundness. These goals need not be incompatible, he said. In the end, however, he told the committee to remember than rendering a lender insolvent will merely assume that the federal government will assume a greater share of the clean-up costs and a community could lose its financial institutions.

David Owen represented the Montana Chamber of Commerce. In order to represent the 840 volunteer members of the organization, he said, they had to travel to 21 cities twice a year to keep in touch. One of the things that came to their attention on the tour in the fall of 1993, was the situation already explained here. Because of the reluctance of banks and business people to restore and finance old gas stations and other properties, many old sites, many at the center of their communities, will sit abandoned and vacant until someone can facilitate a way to ensure production use of those facilities. He urged a favorable consideration of the bill.

Steve Turkiewicz, Executive Vice-President of the Montana Automobile Dealers Association, represented the group which he said is a trader organization for new and used car and truck dealers. Throughout Montana's history, many car dealerships have evolved from service stations, carriage houses and a variety of other businesses established as early as the early 1900's. Over those times, management practices for disposing of wastes were in place that are no longer considered desirable, even though acceptable at the time. He thought this bill would bring much-needed help to their members and all business people who have had to face those problems, and who, along with their lenders, could bring these facilities into compliance.

Riley Johnson, representing the National Federation of Independent Business (NFIB), said that the organization made of up 9,000 small business members support SB 200.

Bob Pyfer, Senior Vice-President for the Montana Credit Unions League, spoke in favor of the proposed legislation. Credit unions do a very limited amount of business lending, he said, but some credit unions are making small-member business loans. They were concerned that the law might be interpreted to apply to residential lending under certain circumstances, which many of their members were getting into, along with home equity lending. SB 200 represented a fair approach to the problem, he said, and urged a Do Pass recommendation.

Bob Stephens, representing the Montana Graingrowers Association and also the Dutton State Bank, told the committee about a young man in the Dutton community with a gas station/bulk plant business who has tried for a year to get financing with the bank. They turned him down twice because of the potential ramification of the environmental threat. The SBA has turned him down, too, he said. With this legislation, he was sure the man could acquire financing and proceed with his business plans. He urged passage of the bill.

Bob Robinson, Director of the Department of Health and Environmental Sciences, spoke as a proponent of the bill with the addition of the amendments. From a non-banker position, he said the bill brought a sense of fairness to the lender, operating as a banker, a trustee or fiduciary. He thought it clarified the liability section of the CECRA law and would be a valuable improvement. The friendly amendments, he said, were developed jointly with his department and the original drafter of the bill from the Bankers' Association. As stated earlier, he said, they offered to have the department review the bill and it was determined that there were some unintended loopholes which have been addressed. The department supported the bill, he said.

Bill Kirley, a council member for the Department of Health, Environmental Remediation Division, prepared written testimony which he said would be a road map for the amendments offered **(EXHIBIT 4).**

John Cadby, representing the Montana Bankers Association, spoke in favor of SB 200. He said this bill have been a great example of the public and private sector working together to help clean up the environment for all of us.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SENATOR STEVE DOHERTY asked **Mr. Kirley** about fiduciary liability

when he said that Montana could become a national leader in putting a cap on liability. Perhaps it would be an incredibly stupid step that nobody else has taken in order to protect banks.

Mr. Kirley said that while there has been some discussion of this issue on that level, no decision had been adopted at the federal level. EPA, in its funded liability rule, did not directly address fiduciary liability in this fashion, however, the Superfund Reauthorization Act which died on the last day of the last congress, has been re-introduced in the current congress, and does address fiduciaries. In fact, the language they used in the bill has been taken from one of the versions of the proposed federal act. We are not adopting what isn't a federal law on this, in usual fashion, but rather are out ahead on this issue and expect the federal government to catch up later, he said.

SENATOR DOHERTY asked if any other states had done this.

Mr. Crowley answered the question by saying that by his canvass of some state laws, he had seen three or four states that had some fiduciary provisions that are somewhat similar to this. He said it was a fairly narrow exemption in that it limits the liability of the trustee to the absence of the trust. It does not exempt the trustee, even if they just had a property that lands on their trust part, they are still liable for the clean up.
The exemption for fiduciaries is not a true exemption. Even if someone dies and the property passes into the trust department of the bank, if that property is contaminated, there is no exemption from liability for that trustee or fiduciary in this rule. It says, "the limits of the cash that go for the clean-up are limited to the assets of the estate of the trust." But the bank itself (the trust department) cannot be held to clean up that property above and beyond the trust assets.

SENATOR DOHERTY asked why the EPA did not adopt the rule that they were proposing.

Mr. Crowley answered that the EPA Lender Liability rule adopted in 1992 did not directly address the liability of fiduciaries. There was mention of them in the preamble of the rule. As Bill Kirley mentioned, both Senate and House versions of the Superfund Reform Legislation that was before the congress last fall had provisions for limited exemptions for trustees and fiduciaries.

Mr. Kirley said that the change is not included in the EPA rule is that it really is a change of the legal standard of the liability and not something that the agency could adopt by rule. In fact, in Kelly vs. EPA, the court found that even on the lender issue the EPA had gone too far in exercising their authority. That change would need to be made in statute, not by executive rule, he said.

SENATOR DOHERTY asked who would be liable if it all fell apart. If the bank was not liable, the fiduciary was not liable, who would be liable, he asked?

Mr. Kirley answered that it was a very fact-specific question depending what parties were out there. There are still a range of parties that are liable under the act including the current owner or operator, and the person who owned the property at the time of the disposal.

SENATOR DOHERTY asked him to envision that they'd all gone bankrupt. The only one left was the bank. The bank owns the property now that they made the loans on. Who would be liable for the clean up?

Mr. Kirley said that at that point, where there is no liable party, there is a fund established, the Equality Protection Fund that gets money from the RIT (Resource Indemnity Trust). That money has been used to clean up sites where there has been no responsible party available.

SENATOR DOHERTY asked, "the taxpayers?"

Mr. Kirley answered, "yes."

SENATOR BRUCE CRIPPEN asked **Mr. Kirley** about the statute of limitations. He said, for an example, in the old days they had a service station on every corner of town. A lot of those have been changed to yogurt shops, etc., many built over old grease spills and traps. He wanted to know if those things happened in 1950 and in 1993 the current owner wanted to get financial aid, how the statute of limitations would apply.

Mr. Kirley said that the question dealt more with retroactive liability. The question is who can be held accountable on this site, he said. The liability can be imposed on a party for contamination that continues today. It imposes liability today for actions that may have been conducted prior to enactment of the statute if those actions have environmental consequences today. If there is a release of hazardous substances today that poses an intermittent and substantial endangerment to human health or the environment, the current owner of the property can be required to clean it up, the person who owned the property at the time of the disposal of those substances can be required to clean it up, the party who may have generated those hazardous substances and caused them to be dumped there could be liable for cleaning them up, he said.

SENATOR CRIPPEN asked if the individual sold the property under contract for deed, still retaining ownership, what would happen?

Mr. Kirley said it was a discussion they had, and was a hard choice whether a contract for deed should be specifically included in the bill. Under contract for deed, the party who is

selling the property was initially the owner of the property and controlled and managed the property fully. They then enter into a contract for deed by which someone else controls the property and makes payments. They still remain the legal owner of the property. They are more than just a lender taking a security interest in that property; they are, in fact, the owner of the property. So they did not include contract for deed expressly in the provisions. One could certainly argue that they are included in the general clause which defines who is the holder of the security interest, but they wanted to have them taken out as one of the express parties that got the protection, he said.

SENATOR LARRY BAER asked **Mr. Kirley** if the bank foreclosed on the property and the bank assumes ownership and then transfers it to someone else, does the new purchaser assume the exemption as a fiduciary or security holder or does it start all over again?

Mr. Kirley said that the exemption from liability applies to the lender to the extent that the lender is protecting his security interest. It does not apply to the purchaser from the lender. It is similar to the EPA and the Superfund Act and a direction they thought the law was going, he explained. Under current law, the court would hold the bank liable at the point it forecloses and takes title. The bill would change that so that the bank can foreclose and take title without fear of liability as long as the bank takes actions to sell the property. If the bank wanted to hold the property and speculate, they would be as any other owner, and not treated differently.

SENATOR BAER asked that if the bank holds a foreclosure proceeding and sheriff's sale and a third party purchases the property, would that party will be subject to liability under the law without any exception as the bank held?

Mr. Kirley said that it was correct.

SENATOR SUE BARTLETT asked **Mr. Kirley** if since the theoretical property in question here was contaminated, would it surprise him if there were no buyers? What is the liability of the bank if they cannot unload that property?

Mr. Kirley said the lenders' concern was the threat that the clean-up may greatly exceed the value of the property. If that were the case, they stand to lose much more than the value of the property, and the bank's other assets could be attached as well. The bill attempts to address that by saying that even by taking the property by foreclosing and trying to sell it, the bank does not incur liability and its other assets are not exposed. If the property is worth nothing as a result, the asset is worth nothing, and that's the economic consequence of the contamination. He said she had recognized a problem they have not been able to resolve. He said there still could be other parties that might be liable for the clean-up, he said. It is not likely when the bank has foreclosed.

SENATOR BARTLETT asked **Mr. Gerlock,** realistically, how much will this free up a bankers' willingness to lend if there is potential for liability on the land they intend to purchase?

Mr. Gerlock said that most lenders will be relieved if this bill passes. Currently the cost of clean-up to the small business owner is in terms of a Phase I Environmental Assessment costing $2,000 and a Phase II for $5,000 then depending on the remedial action necessary, it gets more expensive. Lenders and the SBA now have internal loan policies and require an environmental loan questioning if they find even a hint of contamination. He also addressed the earlier question and told the senator that if the property is so contaminated it has no value, the bank will abandon the property.

SENATOR BARTLETT asked if that would include letting property taxes go delinquent.

Mr. Gerlock said that he had seen that happen.

SENATOR BARTLETT asked when taxes had been delinquent for 36 months what happens, but **Mr. Gerlock** did not know. She said the counties were then required to take a tax deed for the property and it ends up in the lap of the county.

Mr. Gerlock said it was his experience in environmental clean-ups in smaller communities that the majority are not major in size or overly expensive. They can be remedied at minimal cost, he said.

SENATOR BARTLETT further stated that the EPA had proposed and adopted a rule on the lender liability portion and that rule had subsequently been declared invalid by the federal courts because apparently the statute itself did not authorize the EPA to enter into that area of rulemaking. Would he consider that to be a clear example of an executive branch to be exceeding the authority of what the legislative branch had granted in adopting burdensome rules?

Mr. Gerlock said he could only speculate and would not feel comfortable answering that question. When pressed for an opinion by the senator, he replied that he would agree with the statement.

SENATOR DOHERTY asked about the amendments on Page 1 concerning limiting exemptions for creditors and fiduciaries. They also extend those limitations and caps and exemptions to secured fiduciaries and creditors from third party claims. He asked for an example of third party claims and who would bring them.

Mr. Kirley gave the history. The initial bill included a clarification that liabilities to third parties would not be included. The department may bring action against Party A, he said, and it may be the only responsible party. They may bring a contribution action against Parties B and C, and however many.

SENATOR DOHERTY said he understood that, and understood that he was protecting the banks against lawsuits from the government but why were they protecting banks against the lawsuits by other entities, landowners, etc., and why that would be a good policy.

Mr. Kirley explained that it was from the one case in Montana where liability was a substantial threat on the financial solvency of an institution. It was the Miners' Bank case in Butte, he said. In that case the federal government had determined based on its lender liability rule, it was not going to attempt to assert liability against the Miners' Bank. The EPA made that determination. The department had made similar overtures indicating that the department had not filed action trying to recover costs, however, EPA and the department both were pursuing Atlantic Richfield for liability on that site, who in turn, sued the bank. Even though the EPA said the bank was not liable, ARCO was saying their interpretation of federal law was that they were liable. That threat of liability did pose a real threat to the bank's financial solvency. The State of Montana stepped in and entered into its own agreement with the bank and mediated a settlement between them. The bank paid a substantial sum to ARCO and a smaller sum to the state, and received contribution protection in that litigation. The threat of third party liability is as great, or greater than the threat of liability from the government.

SENATOR DOHERTY said that through the amendment, would he make sure that ARCO could not pursue a claim against the bank and the state could not pursue a claim against the bank?

Mr. Kirley said it was correct, both the bill and the amendment would do that.

SENATOR SHARON ESTRADA asked **Mr. Kirley** about property she owned and had up for sale for many years, but because of an environmental problem (an underground tank) finally had to sell to the only buyer, the bank. They didn't want the deed, however, because they knew the problem existed. So they sat on it until the problem could be solved. If this piece of legislation goes through, would the bank feel more secure about taking the deed?

Mr. Kirley said the bank assumed the liability when they assumed the property. The bill would not change that. If they were the lender and were taking back the property because of non-payment, then it would be changed with the new bill and they would not be exposed to liability.

SENATOR LORENTS GROSFIELD asked if the bank abandoned the property, taxes are not paid and the title reverts to the country, what happens?

Mr. Kirley said the county, because it takes the property by involuntary acquisition, would not be one of the liable parties.

If there is no one to clean up the property and it posed a health threat, it could be done by the department using funds from the Environmental Quality Protection Fund. The department would then have a lien against the property for the expenditures.

Closing by Sponsor:

SENATOR LYNCH thanked the committee for the good hearing on the complicated issue. There is a problem for people trying to get loans, he said, and he did not blame the lenders for their positions in not loaning money with the present law. There is no relationship in lending money and then owing more than that because the person defaults and they are looking for deep pockets. This law would change that. He told **SENATOR DOHERTY** that his whole point in sponsoring the bill was that ARCO should not have looked to anyone else to share the responsibility.

HEARING ON SB 132

Opening Statement by Sponsor:

SENATOR AL BISHOP, Senate District 9, sponsored SB 132. This was **SENATOR MIKE HALLIGAN'S** bill, he said, that he carried in 1991 and 1993. The bill is called the Technical Corrections Act regarding the state and probate. The first meeting was held in July at the annual Montana Bar Association and this material was circulated in advance of the meeting. There was a second meeting at the University Law School during the tax institute and over 20 lawyers were in attendance. Most of the changes come from the National Conference of Commissioners of Uniform State Law. Some of the changes were made by practicing lawyers in Montana, he said. It is a long, technical bill, he told the committee.

Proponents' Testimony:

Daniel McLean, on behalf of the State Bar of Montana, Section on Trust and Tax and Business Law, spoke in favor of the bill. The bill is a technical directions bill, he said. It is a follow-up to major changes done in the 1993 session to revamp parts of the probate code. The proposed changes are changes to the 1993 act to correct language, and many changes to the augmented state and elective share. He presented written testimony from **Professor Eck, at the Law School,** identifying item by item changes in the bill. **(EXHIBIT 5).** One important change has to do with inheritance tax, he said. Presently under state gift tax law a person can make a gift of property of up to $10,000 per year to any donee without paying any gift or inheritance tax. This is called an annual exclusion. The old rule was that gifts within three years of death were presumed to be made in contemplation of death and therefore brought back in to the estate for tax purposes. That has been irrelevant in most instances in Montana because if a person didn't have to file a federal gift tax return for that gift, then they also wouldn't have to bring it back into

the estate for Montana purposes. One of the problems is when the gift is larger than $10,000 within three years of death. If it was $20,000 he would be required to file a gift tax for federal taxes but in Montana the whole $20,000 would have to be brought back in entirely for tax calculations. In most cases, if going to a surviving spouse or a lineal decedent, there is no problem. For any other there would be a Montana tax assessed. Most people believe that the $10,000 is free for the state as well as federal purposes, and it should be, so that it is consistent. This bill would say the first $10,000 gift per year is excluded from the tax base if made three years before death. The Department of Revenue may have some idea of financial impact, he said. He said that representatives would have some amendments presented at the hearing and he would strongly oppose the changes, partly because they had no time to study them.

Kristen Juras, attorney, and immediate past Chairperson, Section on Trust and Probate, Great Falls, spoke to the committee. She explained the augmented estate. Before 1993 they did have an augmented estate provision in the code and it says that a person cannot disinherit their spouse. If the will leaves the assets to others, state policy has said that the surviving spouse receives a certain amount of property from the decedent's estate. Before 1993, it was one-third of the estate; in 1993 they changed the concept and now a spouse has to earn it. The longer you are married, the more you share in the decedent's estate. For one year, it would be three per cent. For 15 years, it would be fifty per cent. Another change is that the spouse's assets are also taken into account. They make sure that the surviving spouse is adequately provided for and not impoverishing the spouse. Another change is life insurance, she said. Prior to 1993 the elective share provisions could be defeated by purchasing a life insurance policy because it was not considered part of the augmented estate. The surviving spouse had no rights to elect against the life insurance policy. Because people now buy universal life policies, and use them as investments or retirement accounts, the 1993 law closed the loophole and made this insurance part of the augmented estate and the elective share process. So the elective share cannot be defeated by buying insurance. She said the cases are rare. She opposes the amendments by the insurance companies, she said.

Bob Pyfer, Senior Vice-President of the Montana Credit Unions League, said their interest in the bill had to do with Sections 29-31 of the bill, amending the multiple parties accounts law that was passed in 1993. This is a clarification of the original intent with respect to multiple account owners' ability to change the terms of the account. He urged support of the legislation.

Bruce McGinnis, attorney, Montana Department of Revenue, appeared to support SB 132. Their interest is the change to the inheritance tax. On Page 54, Section 32, he said, under that provision, the amendment is to clarify that if the decedent has made a gift to a person three years prior to his death, those

gifts would not be subject to taxation under the inheritance tax. They feel, based on a decision by the Supreme Court, that to fully effectuate that particular intent, you also have to amend Section 72-16-308 which is presently not included in the bill. The amendment would add a new Section 33 to the bill to provide that when you look at the clear market value of the property in passing, you do not include gifts excluded under the Internal Revenue Section. There would be no question then that the gift of $10,000 made in contemplation of death is not included in the value of the estate. **(EXHIBIT 6).**

John Cadby, representing The Montana Bankers Association, said he sent the original draft to the four trust companies that are chartered to do business in Montana and it was determined to be fine with them. He withheld opinion on the amendments.

Opponents' Testimony:

Denny Moreen, representing the American Council of Life Insurance, the National Organization of Life Insurance Congress based in Washington, D.C., spoke in opposition to the bill as drafted. He presented the amendments presented by his clients. **(EXHIBIT 7).** These are being enacted in North Dakota, he said. The first group deals with the augmented estate. If the spouse decides that she is disinherited and wants to challenge the distribution of the assets, she demands what's called an elective share and the court determines whether she should get more than she's getting. The 1993 revision of the codes said that life insurance would be included in the estate, and he maintained that the insurance industry did not know it was coming and had no part in that ruling. Page 12, Line 5-14 taking out the two-year beneficiary clause had been removed, he said, and the industry was not happy with that. They propose to take the life insurance out of the augmented estate entirely. He said it was not like the other assets; it's unique. It is designed for a specific purpose. This inclusion frustrates that design, he argued. It is used for one reason: to have that sum of money paid immediately upon death to a person named as beneficiary. It buys peace of mind, he said. This is the business of life insurance. As examples he listed the case of a disabled child and a business contract for a partnership. These cases go to the court and the purposes are frustrated. He said the example **Ms. Juras** gave about the spouse being unable to get the insurance, was a theoretical problem and no cases exist. There is a policy reason not to make these changes. Property over which the deceased had ownership distributed through the estate is another type of inclusion, and he asked isn't it exactly what life insurance is not? It is not something the purchaser can take back, but is intended to go outside the process. It is designed not to go through the estate. It creates more problems that it solves. He explained the amendments they were seeking, dealing with notices, a two-day grace period, and an exemption from investigating notices. He doubted the uniformity with other states because of the numerous amendments over the years. He requested that the

committee enact the amendments they proposed.

{Tape: 2; Side: A; Approx. Counter: 00}

Doug Lowney, representing the Montana Association of Life Underwriters, which, he said, is a group of 680 people who work in the practice of writing life insurance in the State of Montana, appeared to support the amendments presented by **Mr. Moreen,** and felt the bill could be supported by his group. He said he saw the life insurance contract being a different sort of relationship between he and his client and the people named as beneficiary. He serves as a facilitator to require the company to pay a certain resources to whomever the client wants. If there is any loss to the estate, the argument could be made that it is the loss of premium only. It allows money to be delivered to a specific person or creditor to fill the needs of the client. He could no longer tell his clients they had this choice and he could not give them any assurance. He urged the amendments to repair the bill.

Greg Van Horssen, representing State Farm Insurance Company of Montana, stood in opposition of the bill. He reviewed **Mr. Moreen's** amendments and recommended the bill Do Pass with the amendments proposed.

Jacqueline Lendmark spoke on behalf of the American Insurance Association (AIA). She also represented Roger McGlen for the Independent Agents of Montana. She opposed the legislation only as it related to the distribution of the augmented estates in the life insurance proceeds and all insurance proceeds. She said they would both support the bill with a Do Pass recommendation with the inclusion of **Mr. Moreen's** amendments. Without the amendments, they would stand in opposition.

<u>Questions From Committee Members and Responses</u>:

SENATOR DOHERTY asked **Ms. Juras** about the partnership life insurance policies for key business people. He wondered if a spouse could get in to a key person policy that the spouse had no involvement in.

Ms. Juras said that the policies could be structured so that they had no negative effect including life insurance and augmented estate. Typically, she said, these policies are owned by the business partners. Spouses can also consent to transfers at the time they're done. Sometimes the estate is named as the beneficiary that accepts the proceeds to turn around and buy the insurance. It would not be negatively affected by including life insurance in the augmented estate, she said.

Mr. Moreen was questioned also by **SENATOR DOHERTY** regarding money paid to the court in an augmented estate, in which the insurance had no involvement with the direction or the beneficiary, what

would be wrong with it? **Mr. Moreen** said that it goes to the heart of the contract, that was what life insurance does, and that would defeat it.

SENATOR DOHERTY asked if it would affect the marketability of the product?

Mr. Moreen said it would because it would have a direct effect on the person purchasing the contract. He or she would not get that peace of mind, he contended.

SENATOR DOHERTY asked if they should be aware of a social policy regarding one spouse defeating another by writing them out of the policy.

Mr. Moreen replied, "Of course, but **Ms. Juras'** example is the only one I can find." He said it does not happen very often. The problems caused by keeping it in the augmented estate are greater that the problem it's intended to solve.

SENATOR DOHERTY further inquired about the division to the surviving spouse for tax purposes, which is one advantage of life insurance. Or is it, he asked? **Mr. Moreen** does not do taxes and didn't answer the question.

SENATOR BAER asked **Ms. Juras** about the part of the code that allows a probate attorney fee to be limited statutorily to a percentage of the value of the estate and wondered if inclusion into the augmented estate affected this situation.

Ms. Juras said it would not, but said attorneys are committed at two per cent beyond probate assets.

SENATOR BARTLETT asked **Mr. McGinnis** what impact on state revenue the $10,000 exclusion of property would have.

Mr. McGinnis said a ball park figure would be based on the fact that they receive 800 estates a year that owe a tax. If each excludes a $10,000 gift, it would be $800,000 excluded, not going to lineal decedents or spouses. At that rate, it would be between $150,000 and $300,000 per year impact, he said.

SENATOR RIC HOLDEN asked **Ms. Juras** asked about a statement she made that the bill was consumer-friendly. The others said it was not so. He wanted to know about a church being a beneficiary.

Ms. Juras said it was current law.

SENATOR HOLDEN asked **Mr. Moreen** about needing a policy change.

Mr. Moreen said life insurance is something you purchase and it is outside of the estate.

SENATOR HALLIGAN asked if the augmented estate was designed as a

safety net to make sure someone is not going on public assistance?

Ms. Juras said that was correct, it predated the 1993 law when wives did not work. She then discussed with the senator how many states had adopted this statute and she did not know.

SENATOR HALLIGAN asked if they had any problems with life insurers having to sue in court to get their proceeds because they were tangled up in an augmented estate issue?

Mr. Juras said she was not aware of any. There were safeguards in the statutes that do permit the insurance to pay if they haven't received notice of the claim of the surviving spouse. They can interpolate it in court.

SENATOR HALLIGAN asked what the experience had been among practicioners, after they adopted the radical changes of the percentages in 1993 in terms of being married 1 year and getting three per cent, etc.?

Ms. Juras said that none of the practitioners she knew had had to implement an elective share under the statute, so there is no experience. So it did not happen very often.

Closing by Sponsor:

SENATOR BISHOP said that law is not a stagnant thing, but is ever-changing to keep abreast of society. People are want to resist change, he said, and although he could understand insurance companies' problems, he thought that it was more of a marketing concept. This bill will protect those who need protection. **Ms. Juras** made the most compelling statement, he said, when she talked about getting the spouses' consent. That takes care of most problems and is a commonplace thing on a will or any transfer of property out of the ordinary, it takes care of it, and there is no scheme to disinherit the spouse, he said.

ADJOURNMENT

Adjournment: ACTING CHAIRMAN REINY JABS adjourned the hearing at 12:20 p.m.

REINY JABS, Chairman

JUDY FELAND, Secretary

RJ/jf

MONTANA SENATE
1995 LEGISLATURE
JUDICIARY COMMITTEE

ROLL CALL BM 312-3 10:00 AM. DATE 1-31-95

NAME	PRESENT	ABSENT	EXCUSED
BRUCE CRIPPEN, CHAIRMAN	✓		
LARRY BAER	✓		
SUE BARTLETT	✓		
AL BISHOP, VICE CHAIRMAN	✓		
STEVE DOHERTY	✓		
SHARON ESTRADA	✓		
LORENTS GROSFIELD	✓		
MIKE HALLIGAN	✓		
RIC HOLDEN	✓		
REINY JABS	✓		
LINDA NELSON	✓		

SEN:1995
wp.rollcall.man

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 1-31-95
BILL NO. SB200

Amendments to Senate Bill No. 200
First Reading Copy

Requested by Senator Lynch
For the Committee on Judiciary

Prepared by Todd Everts, EQC Staff
January 30, 1995

1. Title, line 6.
Following: "INTERESTS;"
Insert: "EXTENDING A LIMITED EXEMPTION TO FIDUCIARIES; DEFINING "FORECLOSURE" AND "FIDUCIARY"; CLARIFYING THE STATUTE OF LIMITATIONS FOR COST RECOVERY TO CONFORM TO THE FEDERAL COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT;"

2. Statement of intent, page 2, line 11.
Following: "a"
Strike: "similar"
Following: "liability"
Insert: ", comparable to the one being proposed for action by congress under CERCLA,"
Following: "fiduciaries"
Insert: "and that it is necessary to add language concerning fiduciaries to Title 75, chapter 10, part 7"

3. Statement of intent, page 2.
Following: "consistent with"
Strike: "and parallel to"

4. Statement of intent, page 2, line 16.
Following: line 16
Insert: "Finally, the legislature intends that the limited exemptions for secured creditors and fiduciaries that are clarified and granted by this legislation extend not only to liability asserted by governmental entities but also extend to claims by any third parties for cleanup or for cost recovery or contribution."

5. Page 3, line 6.
Following: "administrator,"
Insert: "personal representative, custodian, conservator,"
Following: "guardian"
Insert: "or"

6. Page 3, lines 6 and 7.
Strike: ", conservator," on line 6 through "person" on line 7
Insert: "acting or"

7. Page 3, line 7.
Following: "property"

Strike: "in a fiduciary capacity."
Insert: "for the exclusive benefit of another person. The term does not include:

(a) a person who has previously owned or operated the property in a nonfiduciary capacity; or

(b) a person acting as fiduciary with respect to a trust or other fiduciary estate that has no objectively reasonable or substantial purpose apart from avoidance of or limitation of liability under this part."

8. Page 5, lines 12 through 20.
Strike: subsections (18) and (19) in their entirety

9. Page 7, line 30.
Strike: "(7)"
Insert: "(5)"

10. Page 8, line 13 through page 10, line 5.
Strike: subsections (2) and (3) in their entirety
Renumber: subsequent subsections

11. Page 10, line 20 and 25.
Page 12, line 21.
Strike: "(4), and (5)"
Insert: "(2), and (3)"

12. Page 11, line 15.
Strike: "(5)"
Insert: "(3)"

13. Page 11, line 21.
Page 12, line 5.
Strike: "(7)(c)(ii)"
Insert: "(5)(c)(ii)"

14. Page 12, lines 3 and 6.
Strike: "(8)(a)(i)"
Insert: "(6)(a)(i)"

15. Page 12, line 4.
Strike: "(8)(a)(iii)"
Insert: "(6)(a)(iii)"

16. Page 12, line 5.
Strike: "(7)(c)(i)"
Insert: "(5)(c)(i)"

17. Page 12, lines 15 and 21.
Strike: "(7)(b)"
Insert: "(5)(b)"

18. Page 12, lines 15 and 21.
Strike: "(7)(c)"
Insert: "(5)(c)"

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19. Page 12, lines 15, 17, and 22.
Strike: "(8)"
Insert: "(6)"

20. Page 12, line 25.
Insert: "(7) The liability of a fiduciary under the provisions of this part for a release or a threatened release of a hazardous or deleterious substance from a facility held in a fiduciary capacity may not exceed the assets held in the fiduciary capacity that are available to indemnify the fiduciary unless the fiduciary is liable under this part independent of the person's ownership or actions taken in a fiduciary capacity.

(8) A person who holds indicia of ownership in a facility primarily to protect a security interest is not liable under subsections (1)(a) and (1)(b) for having participated in the management of a facility within the meaning of 75-10-701(10)(b) because of any one or any combination of the following:

(a) holding an interest in real or personal property when the interest is being held as security for payment or performance of an obligation, including but not limited to a mortgage, deed of trust, lien, security interest, assignment, pledge, or other right or encumbrance against real or personal property that is furnished by the owner to ensure repayment of a financial obligation;

(b) requiring or conducting financial or environmental assessments of a facility or a portion of a facility, making financing conditional upon environmental compliance, or providing environmental information or reports;

(c) monitoring the operations conducted at a facility or providing access to a facility to the department or its agents or to remedial action contractors;

(d) having the mere capacity or unexercised right to influence a facility's management of hazardous or deleterious substances;

(e) giving advice, information, guidance, or direction concerning the administrative and financial aspects, as opposed to day-to-day operational aspects, of a borrower's operations;

(f) providing general information concerning federal, state, or local laws governing the transportation, storage, treatment, and disposal of hazardous or deleterious substances and concerning the hiring of remedial action contractors;

(g) engaging in financial workouts, restructuring, or refinancing of a borrower's obligations;

(h) collecting rent, maintaining utility services, securing a facility from unauthorized entry, or undertaking other activities to protect or preserve the value of the security interest in a facility;

(i) extending or denying credit to a person owning or in lawful possession of a facility;

(j) in an emergency, requiring or undertaking activities to prevent exposure of persons to hazardous or deleterious substances or to contain a release;

(k) requiring or conducting remedial action in response to a release or threatened release if that prior notice is given to the department and the department approves of the remedial

action; or

(l) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the facility and taking all facts and circumstances into consideration and provided that the holder does not:

(i) outbid or refuse a bid for fair consideration for the property or outbid or refuse a bid that would effectively compensate the holder for the amount secured by the facility;

(ii) worsen the contamination at the facility;

(iii) incur liability under subsection (1)(c) or (1)(d) by arranging for disposal of or transporting hazardous or deleterious substances; or

(iv) engage in conduct described in subsection (9)(a) or (9)(b).

(9) The protection from liability provided in subsections (7) and (8) is not available to a fiduciary or to a person holding indicia of ownership primarily to protect a security interest if the fiduciary or person:

(a) causes or contributes to a new release of hazardous or deleterious substances from the facility;

(b) allows others to cause or contribute to a new release of hazardous or deleterious substances; or

(c) in the case of a person holding indicia of ownership primarily to protect a security interest, through affirmative conduct, participates in the management of a facility by:

(i) exercising decisionmaking control over environmental compliance; or

(ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility for day-to-day decisionmaking either with respect to environmental compliance or substantially all of the operational, but not financial or administrative, aspects of the facility."

21. Page 13, line 12.
Strike: "(7)(c)"
Insert: "(5)(c)"

22. Page 13, line 26.
Strike: "(5)"
Insert: "(3)"

23. Page 14, line 5.
Following: "initial action"
Strike: "for recovery of remedial action costs"
Insert: "brought under 75-10-715(4) or a contribution action for costs incurred under this part."

24. Page 14, line 6.
Following: "the"

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Strike: "remedial action"
Insert: "final permanent remedy"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
1-31-91
SB 200

SENATE BILL 200
(CECRA: Secured Creditor Exemption)

SENATE BILL 200 IS A BILL WHICH CONFORMS PARTS OF MONTANA'S SO-CALLED "MINI-SUPERFUND" LAW (CECRA) TO THE ANALOGOUS PROVISIONS OF THE FEDERAL SUPERFUND LAW (CERCLA).

MOST OF THE BILL ADDRESSES THE NATURE AND SCOPE OF THE EXEMPTION FROM LIABILITY FOR SECURED CREDITORS AND FIDUCIARIES AND MAKES IT THE SAME AS THE FEDERAL EXEMPTION. THE BILL ALSO CONFORMS CECRA'S STATUTE OF LIMITATIONS TO THE FEDERAL STATUTE OF LIMITATIONS. THE AMENDMENTS OFFERED TODAY WERE DISCUSSED AND AGREED UPON BY THE BANKING COMMUNITY AND THE STATE DEPARTMENT OF HEALTH WHICH NOW FULLY SUPPORTS THE BILL.

BOTH CERCLA AND CECRA EXEMPT FROM THE DEFINITION OF "OWNER OR OPERATOR" PERSONS WHO "HOLD THE INDICIA OF OWNERSHIP PRIMARILY TO PROTECT A SECURITY INTEREST" AND WHO DO NOT "PARTICIPATE IN THE MANAGEMENT" OF THE FACILITY. THERE HAS BEEN A LOT OF CONFUSION ABOUT WHAT THE PHRASE "PARTICIPATE IN MANAGEMENT" MEANS AND SO LENDERS HAVE AVOIDED MAKING LOANS TO PERSONS OR BUSINESSES WHERE THERE IS EVEN THE SLIGHTEST HINT THAT THERE IS A PAST, PRESENT OR FUTURE WASTE PROBLEM. THIS BILL WILL CLEAR UP THIS CONFUSION AND FREE UP CREDIT IN THE STATE.

THE BILL:

* LISTS SEVERAL ADMINISTRATIVE ACTIVITIES THAT LENDERS OFTEN PERFORM IN THE COURSE OF OVERSEEING A LOAN AND STATES THAT THESE ACTIVITIES DO NOT AMOUNT TO "PARTICIPATION IN MANAGEMENT;

* STATES THAT LENDERS CAN FORECLOSE ON PROPERTY WHERE THERE IS CONTAMINATION AS LONG AS THEY DON'T TAKE OVER OPERATIONS AND AS LONG AS THEY SELL THE PROPERTY IN A COMMERCIALLY REASONABLE MANNER;

* EXTENDS A MORE LIMITED EXEMPTION TO FIDUCIARIES, PROVIDING THAT, AS LONG AS FIDUCIARIES DON'T WORSEN ANY CONTAMINATION, THE LIABILITY OF THE FIDUCIARY IS LIMITED TO THE ASSETS OF THE TRUST;

* THE BILL DOES PROVIDE THAT IF A LENDER OR FIDUCIARY TAKES OVER OPERATIONS OR ENGAGES IN CONDUCT THAT WORSENS THE CONTAMINATION, THEN THE EXEMPTION IS LOST.

* FINALLY, IN AMENDMENT NO. 13, THE BILL ALSO MAKES CECRA'S STATUTE OF LIMITATIONS FOR CLAIMS OR FOR CONTRIBUTION ACTIONS THE SAME AS THE CERCLA STATUE OF LIMITATIONS. CURRENTLY BOTH STATUTES ARE SIX YEARS BUT CECRA NEEDS TO BE CLARIFIED THAT THE SIX YEARS RUNS FROM THE COMMENCEMENT OF THE FINAL REMEDY WHICH IS WHAT CERCLA STATES. IT'S CLEAR THAT IN 1989 THE LEGISLATURE INTENDED THE CECRA STATUTE OF LIMITATION TO PARALLEL CERCLA AND THIS AMENDMENT PROVIDES THAT CLARIFICATION.

Valencia, despite all of Todd's effort, some of an older version got into this (See below). Can we do a gray bill for executive session? Frank

action; or

(l) taking title to a facility by foreclosure, provided that the holder of indicia of ownership, from the time the holder acquires title, undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the facility and taking all facts and circumstances into consideration and provided that the holder does not:

(i) outbid or refuse a bid for fair consideration for the property or outbid or refuse a bid that would effectively compensate the holder for the amount secured by the facility;

(ii) worsen the contamination at the facility;

(iii) incur liability under subsection (1)(c) or (1)(d) by arranging for disposal of or transporting hazardous or deleterious substances; or

(iv) engage in conduct described in subsection ~~(9)~~(a) or (9)(b). through affirmative conduct

(9) The protection from liability provided in subsections (7) and (8) is not available to a fiduciary or to a person holding indicia of ownership primarily to protect a security interest if the fiduciary or person:

(a) causes or contributes to a ~~new~~ release of hazardous or deleterious substances from the facility;

(b) allows others to cause or contribute to a ~~new~~ release of hazardous or deleterious substances; or

(c) in the case of a person holding indicia of ownership primarily to protect a security interest, ~~through affirmative conduct,~~ actually participates in the management of a facility by:

(i) exercising decisionmaking control over environmental compliance; or

(ii) exercising control at a level comparable to that of a manager of the enterprise with responsibility for day-to-day decisionmaking either with respect to environmental compliance or substantially all of the operational, but not financial or administrative, aspects of the facility."

21. Page 13, line 12.
Strike: "(7)(c)"
Insert: "(5)(c)"

22. Page 13, line 26.
Strike: "(5)"
Insert: "(3)"

23. Page 14, line 5.
Following: "initial action"
Strike: "for recovery of remedial action costs"
Insert: "brought under 75-10-715(4) or a contribution action for costs incurred under this part."

24. Page 14, line 6.
Following: "the"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 1-31-95
SB 200

TESTIMONY IN SUPPORT OF SB 200 (WITH AMENDMENTS)
DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

The issue of lender liability has been the topic of much debate at the national level for several years now. A fear of Superfund liability among lenders is perceived as having a "chilling effect" on the availability of credit for business development, particularly in certain industries. The Department supports the attempt to prevent any such effect of the environmental cleanup laws in Montana.

The Department has been substantially involved in these issues in administering the environmental cleanup laws in Montana. In 1993, the Department entered into a settlement agreement with the former Miners Bank in Butte. In that case the settlement was necessary to prevent potential liability from threatening the financial stability of the bank. In connection with its own settlement, the department also mediated a settlement between the Bank and ARCO, resolving a third party contribution action against the bank and freeing the bank of all claims of liability for the site.

On reviewing SB 200, as introduced, the Department was concerned that the bill would have certain consequences that were not intended and that the scope of the exemptions created would be broader than intended. Consequently, the Department proposed a set of amendments to the representatives of the lending community. Together we have worked out language that we believe will accomplish the intended goals of the lending community and still encourage responsible environmental management of contaminated sites.

I would like to briefly explain some of the amendments to the bill that have been jointly presented to you. The bill addresses three fairly distinct sets of issues in CECRA:

(1) lender liability,
(2) fiduciary liability, and
(3) the statute of limitations.

Lender Liability

In addition to moving certain of the proposed changes to better integrate them with the other provisions of CECRA, and eliminating certain changes that we felt were redundant, we proposed certain changes that would make the exemption under state law more closely track the exemption set out in the EPA lender liability rule. See 40 CFR § 300.1100. Although this rule has been declared invalid by the federal courts, Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), we believe it represents the clear direction of the federal law, since similar provisions were included in both the Senate and House versions of the Superfund Reauthorization Act which was proposed in

the last Congress. Similar provisions on lender liability have already been introduced in this Congress. Lender liability is one area where there has been some sense of national consensus on the appropriate scope, and that is what we are trying to embody in these amendments.

Fiduciary Liability

The provisions in the introduced bill would have fully exempted from liability any fiduciary holding assets in trust or other fiduciary capacity. The department was concerned that the wording of the fiduciary exemption would have allowed all responsible parties to avoid liability simply by transferring their contaminated properties into trust.

Instead the Department has proposed an exemption for fiduciaries modelled on the proposed federal Superfund Reauthorization Act. (See amendment no. 10, new section (7)). This exemption would effectively limit the liability of a fiduciary to the assets of the trust, as long as the trustee does not affirmatively cause or contribute to the contamination. In adopting such a standard at this time, Montana would be a national leader on this issue. However, we believe that this would impose reasonable and appropriate standards for liability of fiduciaries.

The Statute of Limitations

Currently under state law, § 75-10-722(5), MCA, cost recovery actions must be commenced by the Department "within 6 years after initiation of physical onsite construction of the remedial action." The original intent was to provide a statute of limitations for cost recovery actions that was similar to that in the federal law, and the current language is the same as the federal law.

The operative term in the current language is "remedial action". Because of the condensing of the federal law into a much more concise state statute, the state law contains a different definition of "remedial action" from that contained in the federal law. Under the state law the definition of "remedial action" includes virtually all activities conducted as part of a response, while under federal law the definition of "remedial action" is defined in terms of only the final permanent remedy. Consequently, it could be argued that under the state law the statute of limitations would run, for example, six years from the initial placement of a monitoring well during the site investigation, a very early stage of the investigation. In comparison, and under the federal law, the statute would not begin to run until the onset of construction associated with the final permanent remedy selected at the site, typically much later in the cleanup process.

Under this possible reading of the current state statute of limitations, our preliminary review has indicated that for approximately 30 sites the Department would need to file cost recovery lawsuits this spring to ensure its ability to recover its

EXHIBIT 4
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SB 200

costs, as required by the statute. Over the next two years, lawsuits would be filed at an additional 15-20 sites. At most of these sites the responsible parties are already conducting cleanup actions and reimbursing department costs, so most of this litigation would be entirely unnecessary and would serve no constructive purpose other than to meet the current state statute of limitations. This litigation would polarize cooperative relationships and would constitute a waste of resources for all parties involved. The resources consumed by this litigation would be drawn away from cleanup efforts and toward court costs and attorney fees, a losing situation for everyone. Amendment number ~~13~~ 24 would correct this problem.

When we initially proposed this change, we received comments from responsible parties and others indicating that the statute of limitations should be broadened to make it clear that contribution actions brought by the responsible parties conducting the cleanups against other liable parties are subject to the same statute of limitations. In addition, the Natural Resource Damage Litigation Program in the State Department of Justice asked that we make it clear that natural resource damage actions are subject to the same statute of limitations. Under federal law these other types of actions each have their own statutes of limitations. However, in response to these requests by these other parties, we believe that a single, uniform statute of limitations for all these actions is reasonable and appropriate. Accordingly, amendment number ~~12~~ on 23 the amendment sheet would bring these other types of actions under the same statute of limitations.

Testimony presented by:
William B. Kirley
Legal Counsel
Environmental Remediation Division
Department of Health and Environmental Sciences
Telephone: 444-1420

August 3, 1994

To: Commissioner Edwin E. Eck
Montana

Dear Ed:

Since I plan to be away from office matters until early September, I'm writing this during the ULC conference in Chicago so that you can advise Robert C. Pyfer of Montana Credit Union Network of my thoughts regarding the questions posed in his letter to you of July 28.

The questions posed probe the meaning of Section 6-213 of UPC (1990). More specifically, the language "The type of account may be altered by ..[notice]..given by a party...to change the type of account or to stop or vary payment under the terms of the account" is involved. The questions all probe the extent to which a party may affect the interests in the account of other parties or beneficiaries.

My answer to the questions is that a party, by use of 6-213 or by closing the account by withdrawal and opening a new account with quite different provisions, can alter an account's provisions regarding survivors rights in any respect and without reference to wheter a different classification of account results.

I recognize the possibility that "type of account" might be read as suggested in 6-203 to refer to the general categories of multiple person accounts covered by the legislation; e.g., those mentioned in 6-203(a). However, "type" is not defined by the statute and so may be used with different meanings in various parts of the legislation.

I contend that "type of account" in 6-213 is used in the sense of "terms of the account". In support, I note that the section on which 6-213 is based (section 6-105 in original UPC) used the language "form of the account". The word "form" is closer to "terms" than is "type" in my view.

More importantly, the policy reflected by 6-213 is that a "party" to a multiple-person account as defined by 6-201(b) has total control over the account balance, meaning that he or she can do anything by way of altering the account that might be accomplished by withdrawal to close the account followed by opening a new account in different terms. It would be unfortunate, in my view, if a credit union had to insist that an account be closed and re-opened as a condition to its avoiding criticism and possible liability for respecting a written demand by an account party for a change in the terms of an account.

If section 6-213 is read to force such an unfortunate procedure, the party seeking a change is invited to close the account by withdrawal and take his business to a more cooperative

depository. I doubt that a court would construe "type of account" to force such a "can't win" scenario on a bank or credit union.

I realize that the power of a party to cause changes of all sorts in account terms in which others have interests can be used abusively. However, the same is true of any multiple person account involving two or more parties. Persons depositing funds in an account that enables another party (note that an agent is not a party; 6-201(b)) to control the account must live with the consequences. Depositories should alert customers to the perils to one's savings that attend addition of names to an account otherwise than as p.o.d. beneficiaries or as agents of the principal party.

Nat Sterling and I agree that "type of account" in section 6-213 probably should be changed to "terms of the account" as defined in 6-201(12). I intend to recommend that JEB-UPC consider a technical amendment to this effect. If I can get the group to agree to this by correspondence, we would be in position to get the matter before the ULC Executive Committee for consideration at its mid-winter meeting in 1995, and on to the Conference in time for action at the 1995 annual meeting. If you can effect this technical change in the Montana statute before late 1995, I think it would be wise to do so.

Sincerely,

Richard V. Wellman

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 1-31-95
BILL NO. SB132

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Printed by: Lane, Valencia
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From: McGinnis, Bruce
Sent at: 1-30-95 5:03p
Message: Valencia: Attached are amendments to SB-132. If you have any questions please call me at 444-3340. Bruce
Subject: SB-132 Amendments
Author: Bruce McGinnis
Doc name: SB0132A1.LGA
Type: PC file
To: Lane, Valencia
cc: Woodgerd, David
Miller, Jeff

Amendments to Senate Bill 132
Introduced Copy

Prepared by Department of Revenue

REASON FOR AMENDMENT: This amendment clarifies that a transfer of property made in contemplation of death will not be taxed on the property's clear market value. Senate Bill 132 would amend section 72-16-301, MCA, to provide an annual gift exclusion of $10,000 per donee for gifts made within three years of the decent's death. In other words the first $10,000 of gifts made to a donee during the year would not be subject to state inheritance tax. This parallels the federal estate and gift tax provisions. However, unless 72-16-308, MCA is also amended to clarify that Montana's inheritance tax will not be imposed on the market value of such gifts, the two statutes would be in conflict. Section 72-16-308(2), MCA, as set forth below is explicit in stating that only the deductions allowed in that statute will be allowed when determining the value of property transfers for inheritance tax purposes. This amendment harmonizes the two statutes.

1. Title, line 19.
Following: "72-16-301,"
Insert: "72-16-308"

2. Page 54.
Following: line 15
Insert: "Section 33. Section 72-16-308, MCA, is amended to read:

72-16-308. Tax to be on clear market value -- deductions allowed in determining value -- valuation of certain farm and business property. (1) The tax so imposed shall be upon the clear market value of such property passing by any such transfer to each person, institution, association, corporation, or body politic at the rates hereinafter prescribed and only upon the excess of the exemption hereinafter granted to such person, institution, association, corporation, or body politic.
(2) In determining the clear market value of the property so passing by any such transfer, the following deductions and no other shall be allowed:
(a) debts of the decedent owing at the date of death, provided that any debt secured by decedent's joint interest in property and for which the decedent was jointly and severally liable is deductible only to the extent of one-half or other proper fraction representing decedent's share of the property;
(b) expenses of funeral and last illness;
(c) all Montana state, county, municipal, and federal taxes, including all penalties and interest thereon, owing by decedent at the date of death;
(d) the ordinary expenses of administration, including:
(i) the commissions and fees of executors and administrators

and their attorneys actually allowed and paid;
(ii) attorneys' fees, filing fees, necessary expenses, and closing costs incident to proceedings to terminate joint tenancies, termination of life estates and transfers in contemplation of death, and any and all other proceedings instituted for the determination of inheritance tax; and
(e) federal estate taxes due or paid; and
(f) the annual gift exclusion provided in section 2503(b) of

the Internal Revenue Code.

(3) In determining clear market value, the valuation of certain farm and other real property may be made under 72-16-331 through 72-16-342.""

Renumber: subsequent sections

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 1-31-95
BILL NO. SB 132

PROPOSED AMENDMENTS TO SENATE BILL NO. 132
INTRODUCED COPY

Prepared by Dennis Moreen
American Council of Life Insurance
January 30, 1995

1. Page 2, line 21
Strike: "an insurance or annuity policy,"

2. Page 2, line 22
Following: ";"
Insert: "or"

3. Page 2, line 23
Strike: line 23 in its entirety
Renumber: subsequent subsections

4. Page 2, lines 26 through 27
Following: "donee,"
Strike: remainder of line 26 through "appointment" on line 27

5. Page 2, line 30
Following: "(a)"
Strike: "an insurance or annuity policy,"

6. Page 3, line 1
Following: ";"
Insert: "or"

7. Page 3, line 2
Strike: line 2 in its entirety

8. Page 3, line 3
Strike: "(c)"
Insert: "(b)"

9. Page 12, lines 5 through 14
Strike: subsection (D) in its entirety

10. Page 13, lines 12 through 16
Strike: subsection (B) in its entirety
Renumber: subsequent subsections

11. Page 14, line 5
Following: ";"
Insert: "(iii) proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent that the decedent alone and immediately before death held presently exercisable general power of appointment over the policy or its proceeds; the amount included is the value of the proceeds, to the extent that they were payable at the decedent's death;"
Renumber: subsequent subsections

12. Page 14, lines 28 through 30
Strike: line 28 in its entirety through "." on line 30

13. Page 15, line 8
Following: "."
Insert: "(c) Life insurance, accident insurance, pension, profit-sharing, retirement, and other benefit plans payable to persons other than the decedent's surviving spouse or the decedent's estate are also excluded from the decedent's nonprobate transfers."

14. Page 19, line 13
Strike: "good faith"

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15. Page 19, line 16
Following: "liable"
Insert: "only"
Following: "for"
Strike: remainder of line 16

16. Page 19, line 17
Following: "taken"
Insert: "two or more business days"

17. Page 19, line 18
Following: "."
Insert: "The written notice must indicate the name of the decedent, the date of the decedent's death, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that the spouse intends to file a petition for the elective share or that a petition for the elective share has been filed. Any form of service of notice other than that described in subsection (2) is not sufficient to impose liability on a payer or other third party for actions taken pursuant to the governing instrument."

18. Page 19, line 19 through line 20
Following: "notice"
Strike: remainder of line 19 through "filed" on line 20

19. Page 19, line 22
Following: "."
Insert: "Notice to a sales representative of the payer or other third party does not constitute notice to the payer or other third party."

20. Page 19, line 27
Following: "."
Insert: "The availability of an action under this section does not prevent the payer or other third party from taking any other action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written

notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payer or other third party for any such payment, transfer, or deposit with the court, even if no probate proceedings have been commenced before the payment, transfer, or deposit."

21. Page 20, line 1
Following: "."
Insert: "A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court."

22. Page 20, line 2
Following: "claims"
Insert: "under the governing instrument or applicable law"

23. Page 41, line 21
Following: the first "party"
Insert: "does not have a duty or obligation to make any determination as to whether the decedent was a victim of a felonious killing or to seek any evidence with respect to a felonious killing even if the circumstances of the decedent's death are suspicious or questionable as to the beneficiary's participation in any such felonious killing. A payer or other third party"

24. Page 41, line 21
Following: "is"
Insert: "only"
Following: "for"
Strike: "a payment made or other action"
Insert: "actions"
Following: "taken"
Insert: "two or more business days"
Following: "after"
Insert: "the actual receipt by"

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25. Page 41, line 22
Strike: "received"
Insert: "of"
Following: "notice"
Insert: "."
Strike: remainder of line 22
Insert: "The payer or other third party may be liable for actions taken pursuant to the governing instrument only if the form of the service is that described in subsection (b)."

26. Page 41, line 23
Following: "(b)"
Insert: "The written notice must indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a claim of forfeiture or revocation is being made under this section."

27. Page 41, line 25
Following: "."
Insert: "Notice to a sales representative of the payer or other third party does not constitute notice to the payer or other third party."

28. Page 41, line 30
Following: "."
Insert: "In addition to the actions available under this section, the payer or other third party may take any action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transferred to or deposit with the court of any item of property, even if no probate proceedings have been commenced before the payment, transfer, or deposit. "

29. Page 42, line 1
Following: "."
Insert: "A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court."

30. Page 42, line 4
Following: "A"
Strike: "person"
Insert: "bona fide purchaser"
Following: "property"
Strike: "for value and without notice"

31. Page 42, line 12
Following: "law"
Insert: ", other than the federal Employee Retirement Income Security Act of 1974, as amended,"

32. Page 44, line 14
Following: "party"
Insert: "does not have a duty or obligation to inquire as to the continued marital relationship between the decedent and a beneficiary or to seek any evidence with respect to a marital relationship. A payer or other third party"

Following: "is"
Insert: "only"
Following: "for"
Strike: a payment made or other action"
Insert: "actions"
Following: "taken"
Insert: "two or more business days"

33. Page 44, line 15
Following: "after"
Insert: "the actual receipt by"
Following: "party"

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Strike: "received"
Insert: "of"
Following: "notice"
Insert: "."
Strike: "of a claimed forfeiture or revocation under this section."
Insert: "The payer or other third party may be liable for actions taken pursuant to the governing instrument only if the form of service is that described in subsection (b)."

34. Page 44, line 17
Following: "(b)"
Insert: "The written notice must indicate the name of the decedent, the name of the person asserting an interest, the nature of the payment or item of property or other benefit, and a statement that a divorce, dissolution, annulment, or remarriage of the decent and the designated beneficiary occurred."

35. Page 44, line 24
Following: "."
Insert: "In addition the actions available under this section, the payer or other third party may take any action authorized by law or the governing instrument. If no probate proceedings have been commenced, the payer or other third party shall file with the court a copy of the written notice received by the payer or other third party, with the payment of funds or transfer or deposit of property. The court may not charge a filing fee to the payer or other third party for the payment to the court of amounts owed or transferred to or deposit with the court of any item of property, even if no probate proceedings have been commenced before the payment, transfer, or deposit."

36. Page 44, line 25
Following: "."
Insert: "A filing fee, if any, may be charged upon disbursement either to the recipient or against the funds or property on deposit with the court, in the discretion of the court."

37. Page 44, line 28
Following: "A"
Strike: "person"
Insert: "bona fide purchaser"

38. Page 44, line 29
Following: "for"
Strike: "for value and without notice"

39. Page 45, line 8
Following: "law"
Insert: ", other than the federal Employee Retirement Income Security Act of 1974, as amended,"

DATE 1-31-95

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: SB 200 SB 132

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Name	Representing	Bill No.	Check One: Support	Oppose
GEORGE BENNETT	MONT. BANKERS ASSN	SB 200	✓	
Bruce McGinnis	DOR	SB-132	—	
Bob Robinson	MDHES	SB200	✓	
Jack CADBY	MT BANKERS ASSN	SB 132 ✓ SB200 ✓		
Bruce Gerlock mt.	Independent Bankers	SB200	✓	
Denny Moreen	ACLT	SB132	✓	✓
Tom Hopgood	Mt. Ind. Bankers Assoc	SB 200	✓	
Dave Crowley	M Bankers Assn		✓	
Tim Gill	MT Livestock Ag. Credit Ins	SB200	✓	
Doug Lowney	Mt Assoc. Life Underwriters	SB 132	—	
Bill Kirley	MDHES	SB200	✓	
Daniel N. McLean	State Bar of Montana	SB 132	✓	
Roger Alexander	MT Petroleum Marketers	SB200	✓	
J. Andrew Nuss	Valley Bank - Helena	SB 200	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

_____

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Name	Representing	Bill No.	Check One: Support	Oppose
Kristen Juras	State Bar	SB132	✓	
Riley Johnson	NFIB	SB200	✓	
David Queen	MT Chamber	SB 200	✓	
Donald W. Hutchinson	STATE OF MT. Banking & Financial Div.	SB 200	✓	
Bob Stephens	Dutton State Bank	SB 200	✓	
Steve Turkiewicz	Mt. Auto Dealers Assn	SB200	✓	
Bob Pyfer	MT Credit Union League	SB200	✓	
Bob Pyfer	MT Credit Union League	SB200	✓	
Greg Van Horssen	State Farm Insurance Co	SB 132	✓ with	Amendments
Jacqueline Lenmark	Am. Ins. Assoc	SB 132	✓ w/ amdt	
Roger McGlenn	Ind. Ins. Agents of MT	SB 132	✓ w/ amdt	

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