MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BRUCE D. CRIPPEN**, on January 14, 1997, at 10:00 A.M., in Senate Judiciary Room.

ROLL CALL

Members Present:

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

Members Excused: None

Members Absent: None

Staff Present: Valencia Lane, Legislative Services Division
Judy Keintz, Committee Secretary

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

Committee Business Summary:

Hearing(s) & Date(s) Posted:	SB 103, 01/06/97
	SB 106, 01/06/97
Executive Action:	SB 36, DO PASS AS AMENDED
	SB 2, DO PASS AS AMENDED

HEARING ON SB 103

Sponsor: **SENATOR FRED VAN VALKENBURG, SD 32, Missoula**

Proponents:

--Gene Prendergast, Adjutant General,State of Montana
--Mike McCabe, Staff Attorney for Organized Militia of the State of Montana
--Roger Hagen, Enlisted Officers Association, National Guard of Montana
--Bill Gianoulias, Chief Defense Council for the State of Montana

Opponents: --Russell Hill, Montana Trial Lawyers Association

Opening Statement by Sponsor:

SEN. FRED VAN VALKENBURG, Senate District 32, Missoula, introduced SB 103 at the request of the Department of Military Affairs. The bill would grant immunity to the State of Montana with respect to any activities of officers, employees or agents of the Montana National Guard when those officers, employees or agents are acting solely in their federal capacity. The National Guard is a unique state entity in that its existence and creation is largely due to the mandates of the federal government and the funding provided by the federal government. Probably something in the neighborhood of 90% or more of the National Guard's funding and actual duty relates to its federal responsibilities and dictates. However, the National Guard is commanded by the Montana Adjutant General who is a department director in the Montana governmental scheme and who is a state employee. What has happened in the past is that Montana National Guard employees and officers have been involved in situations where someone is injured and then either an injured party or survivors of the injured party or decedent, eventually sues the State of Montana for damages resulting from those injuries. The National Guard is then required to defend itself. In Montana that takes the form of having the Tort Claims Division at the Department of Administration defend that suit and then, if there is potential recovery, it exposes the state to monetary damage liability with respect to that activity. That would be all good and well if it weren't for the fact that most of these claims have arisen out of situations involving National Guard activities which are almost purely federal in nature. It is far more appropriate that under those circumstances, where the guard is acting solely in a federal capacity, that injured parties be able to pursue their claims against the federal government. That is exactly what the Federal Tort Claims Act was enacted by Congress to allow and to provide for. We are not saying that injured parties should be denied any right to recover damages, but rather, that they should pursue their claims under the Federal Tort Claims Act against the federal government. **SEN. VAN VALKENBURG** is very supportive of individuals being able to pursue their rights under the Constitution through a jury trial, if necessary, and to obtain full redress for those damages. When the federal government mandates the activity that is involved, provides the funding for that activity, and even has its own employees involved in that activity, the State of Montana should not be on the line financially for injuries that may occur in the course of performing what in many instances is inherently dangerous activity. This includes instances where jet fighters are flying throughout the state, tanks are engaged in training missions, and weapons are being fired. The potential financial risk to the State of Montana is very significant.

Proponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 7.2; Comments: .}

Gene Prendergast, Adjutant General of the State of Montana, presented his written testimony in support of SB 103, **EXHIBIT 1.**

Mike McCabe, Staff Attorney for Organized Militia of the State of Montana, presented his written testimony in support of SB 103, **EXHIBIT 2.**

Roger Hagen, Enlisted Officers Association, National Guard of Montana, spoke in favor of SB 103. As members of the Montana National Guard they recognize their dual status commitment which places them in either a federal or state active/inactive duty training status. They understand when they take their oath of office to the president of the United States as well as to the governor of Montana that they do have two distinct and separate missions. They understand also that they operate within those missions under a different authority. Their members expect a clear and definitive law which protects their actions while they are in the line of duty. It is reasonable for them to assume that when they perform their federal mission they are covered by the Federal Tort Claims Act. It is also reasonable for them to assume that when they are performing their state active duty mission doing those things referenced by **Col. McCabe** such as forest fires, floods, and snow shoveling, that they would be covered by State Tort Claims. They believe that this bill will clearly define this situation.

Bill Gianoulias, Chief Defense Council for the State of Montana, rose in support of SB 103. The state ought to pay for its acts or the acts of its employees and the federal government ought to pay for its acts or the acts of its employees and this bill makes that clear.

Opponents' Testimony:

{Tape: 1; Side: a; Approx. Time Count: 25.5; Comments: .}

Russell Hill, Montana Trial Lawyers Association, spoke in opposition to SB 103. Adjutant General Prendergast has indicated that the bill puts liability on the federal government where it belongs. He also referred to federal standards for the state's participation and involvement in the National Guard and various activities. This does not bar victims who are hurt from seeking compensation. He is not convinced that that is correct because the status of a member of the National Guard as a federal employee, even when engaged in federal activities, is not the relevant test. The relevant test is whether the state had a duty, perhaps imposed by the federal government, to administer or to act in a certain way. If the state violates its own duty and a tragedy occurs, there is no guarantee that then the person injured has the same claim under the Federal Tort Claims Act. This bill is brought before the committee for two reasons: savings from exposure to liability for these kinds of accidents and savings from defense costs involved in these kinds of actions. If the bill is passed there will be both savings but it will not come from a

clarification of the situation. This bill will achieve savings from people who are injured who will not be getting compensation when it was the state's breach of a duty and not the federal breach of duty.

Questions From Committee Members and Responses:

{Tape: 1; Side: a; Approx. Time Count: 28.7; Comments: .}

SEN. MIKE HALLIGAN questioned the situation in concurrent actions.

SEN. VAN VALKENBURG commented that there usually are not concurrent activities. The biggest issue in that regard is that the Commander of the Montana National Guard is a state employee. That is the theory by which plaintiffs' lawyers try to place state responsibility at times when the guard is acting solely in its federal capacity.

Lt. Col. McCabe affirmed that the only instance of concurrent activity would be the situation where the adjutant general acts in his capacity during the week, when not on military orders as a two star general on the federal side, in supervising and managing the Department of Military Affairs. Other than that, the Guard is performing the uniquely federal mission of training. That is all they are here for. The enabling statute for the Department of Military Affairs, numbers 3 and 6, clearly articulate that the department exists to satisfy the training requirements of the federal government and that is done for purposes of making sure that there is a militia to call into state active duty which is already in place. They receive $139 million from the federal government and approximately $2 million from the Department of Military Affairs. Ninety-eight dollars of federal money is spent for every dollar of state fund. They do not perform any state missions except on state active duty.

SEN. HALLIGAN posed the possibility of the federal government declaring Lincoln County as a disaster area and the governor calls out the National Guard to help in that area. Is that a federal or a state activity?

Lt. Col. McCabe stated there can be an emergency in a county for floods, fires, etc., and the response in most instances is a state response. The Governor declares a state of emergency and calls the guard into state active duty which is paid out of a state emergency fund. Then in response to the Federal Emergency Management System, federal funds will repay the state for the costs. While the guard is in that capacity, they are performing state active duty. There have been instances in the past where the federal government has called the guard to federal active duty, Title 10 duty. That takes it out of the control of the governor of the state. The best example would be the postal strike in the 70s. The Guard was called out to deliver mail. They were on federal active duty paid by the federal government during that time. You may have

concurrent activities but you do not have a concurrent status for what the guard is doing.

SEN. LORENTS GROSFIELD asked if an injured guard member received a better deal from the state system or the federal system?

Adjutant General Prendergast felt that the federal system was better. If they are on state active duty, shoveling snow, etc., and are injured, that would be covered under Workers' Compensation. If they are on federal active duty under Title 32 and are injured, they would be covered by the Federal Torts Claim Act. The compensation from the Federal Torts Claim Act is much better than Workers' Compensation.

SEN. GROSFIELD questioned why the state would be brought into the case if the federal program is better?

Adjutant General Prendergast stated it would be because they were under state active duty. When the governor of Montana, the Commander in Chief of the Organized Militia, calls them on state active duty, they are completely under the authority of the governor of the State of Montana. To cause a presidential declaration, President Clinton would have to call them to federal active duty and that is only used in time of war.

SEN. GROSFIELD commented that this bill would not change that situation. If they were on state active duty responding to a call from the governor, the state would be liable. Why is this bill brought by the Department of Military Affairs? A bill like this would come up after the state was sued for a large amount and someone concerned about the state budget would bring this type of bill.

Lt. Col. McCabe explained how the cases are developing. Montana has seen an influx in litigation against the Montana National Guard and the State of Montana. In Emsley v. State of Washington in 1986, the State of Washington was sued because they were supervising the National Guard by an active duty person who was injured by the National Guard activity. There was a substantial recovery and subsequent to that there has been an increase in litigation involving the Department of Military Affairs in the State of Montana. There is a belief that if the Department of Military Affairs is involved with the federal mission, injured parties can go to the Federal Tort Claims Act and after recovering there come back and sue the State of Montana. Alternatively, they can choose their remedy by going after the state because this is a new area of law which is still being defined. This bill is truly intended to give the legislature an opportunity to articulate a clear distinction between the federal mission, where there would be coverage by the Federal Tort Claims Act and the state mission, which would be state active duty.

SEN. VAN VALKENBURG stated he did not request the bill, but the argument the Department of Military Affairs made to him was very

persuasive in terms of the state's financial exposure with respect to these issues. The state is in litigation right now with respect to some very significant damage claims. The Montana Supreme Court heard oral argument last fall in two cases involving claims against the state of very significant proportion. Several years ago two tanks ran into each other at Fort Harrison. The drivers of the two tanks died. The claim for that case is in the millions of dollars. This bill will not affect anything pending, it is prospective in nature only. The state needs to be aware of the potential liability. Under the federal law it may be that guard members have a better financial opportunity than they would with Workers' Comp claims but under the Federal Tort Claims Act, injured parties are limited in terms of non-economic damages. They cannot claim punitive or exemplary damages. The statute of limitations is lessened to two years, from three years.

SEN. STEVE DOHERTY asked how many lawsuits there have been against the state since 1986 and how much the state has paid. He also questioned the number of cases in which two recoveries were allowed for a plaintiff.

Lt. Col. McCabe stated that the estates of the guard members killed while servicing and testing M-1 tanks recovered $750,000 apiece. Both of those individuals have already been compensated by the federal government and are now seeking recovery from the state of Montana for negligence. The second case involves a Title 10 active duty military member who, in the midst of receiving medical evaluation and medical care through the military system, stopped and filed suit alleging that the State of Montana as a supervisor for the Montana National Guard was negligent in the working environment it provided. The monetary amount of that claim has not yet been determined. Those two cases are presently pending before the Montana Supreme Court. The third case is a recent claim filed by a federal employee stating that the State of Montana was negligent in its supervision and management of the Montana National Guard in providing an unsafe working environment.

SEN. DOHERTY commented the two federal employees in the M-1 tank incident were barred by seeking a claim against the United States Military.

Lt. Col. McCabe agreed that was the ruling under the Feres Doctrine from the district court. This is pending in the Montana Supreme Court at this time.

SEN. DOHERTY clarified that those individuals were able to obtain relief from the federal government under federal workers' comp statutes, bit they were unable to sue because the federal government is immune from suit by active duty military personnel while engaged in military duty.

Lt. Col. McCabe commented they were unable to sue, but they could have proceeded to file an action under the Federal Tort Claims Act for processing. Neither of them did.

SEN. DOHERTY reiterated that under the Feres Doctrine it is the individual members of the National Guard who cannot bring a suit against the federal government for damages while they are on active military duty.

Lt. Col. McCabe agreed that was correct.

Closing by Sponsor:

{Tape: 1; Side: b; Approx. Time Count: 4.1; Comments: .}

SEN. VAN VALKENBURG commented that there is a very important issue for the legislature to decide which is whether the State of Montana should continue to be subject to claims by individuals who have been injured as a result of activities conducted by the National Guard acting solely in its federal capacity. We all have great sympathy for injured individuals. Sometimes individuals bring about injuries through their own fault and are not compensated as a result of negligence. To the extent that there is fault or potential compensation, the federal government should be the entity that is responsible for making those individuals as whole as they can be made as a result of the injuries which they have suffered. To the extent that we assume federal liability for this, we are diverting Montana resources from the education of our children, the welfare of our citizenry, and the public safety of Montanans.

CHAIRMAN CRIPPEN explained the committee received a letter from Brian Abel of Helena who opposed the bill and asked that it be submitted as testimony. **EXHIBIT 3.**

HEARING ON SB 106

{Tape: 1; Side: b; Approx. Time Count: 10.2; Comments: .}

Sponsor: SENATOR VAN VALKENBURG

Proponents:
--Brenda Nordlund, Assistant Attorney General for Department of Justice
--Mike Menahan, Lewis and Clark Deputy County Attorney
--Ben Havdahl, Montana Motor Carriers Association
--Charles Brooks, Statewide DUI Task Force
--Bert J. Obert, Officer, Montana Highway Patrol
--Troy McGee, Helena Chief of Police representing Chiefs of Police Association in Montana
--Jim Smith, Montana Sheriffs and Peace Officers
--Association

Opponents: None

Opening Statement by Sponsor:

SEN. VAN VALKENBURG, Senate District 32, Missoula, introduced SB 106. This bill was introduced at the request of the Department of

Justice. This bill is a general revision of driving under the influence laws with certain specific purposes. The Department has looked at past changes made in DUI laws, assessed their effectiveness in terms of dealing with the overall issue of keeping drunk drivers off the roads of Montana, and took into account court decisions that have interpreted some of those laws and fine tuned these laws to effectuate what the Department believes is the overall intent of the legislature in the past adoption of those laws. The most significant part of this bill is that the results of preliminary alcohol concentration tests would become clearly admissible evidence in DUI prosecutions. There are some jurisdictions which believe that those results are not admissible. Other jurisdictions conclude that they are admissible. This bill would clearly make them admissible.

Proponents' Testimony:

{Tape: 1; Side: b; Approx. Time Count: 12.8; Comments: .}

Brenda Nordlund, Assistant Attorney General for Department of Justice, stated she is also the liaison to the state DUI Task Force and was intimately involved with all the legislation which was passed last session. This bill is a technical bill where the Department seeks to fine tune existing laws to make the job of the law enforcement officer on the street and the prosecutor in the courtroom more efficient and clearly understandable by all. The preeminent amendment in this bill is that it will clearly allow the admissibility of preliminary alcohol screening tests in DUI trials and also a minor under the age of 21 operating a motor vehicle with an alcohol concentration in excess of .02. trials. The law which was amended in 1995, page 6, lines 26 thru 27, stated that the PBT test results may be used for determining whether probable costs exists to believe that a person violated either the DUI statute, the per se statute (in excess of .10) or the minor .02 statute. When the Department found itself in litigation over the PBT they found that district courts and justice courts were relying on this language, which is permissive in nature, to determine that PBT test results could not be used in the case in chief. They were using them solely for purposes of motions to suppress for lack of probable cause to support the arrest. That creates an anomaly because the officer is using scientific instrumentation to estimate the alcohol concentration in a motorist's body while at the same time he is using a battery of field sobriety tests which have been commonly employed and admitted into evidence in the course of the case in chief. Those tests are the walk and turn, the one-leg stand and the horizontal gaze and eye stagments. The anomaly is while they could use certain probable cause evidence, based on interpretations of last session's changes with the PBT statute, the PBT test results, which are arguably much more objective and less subjective than the other three tests which are commonly employed, were not getting to the jury. They would like this committee to clarify the proper interpretation of the use of PBT tests.

They are asking the committee to endorse the standardization and oversight of field sobriety testing and drug recognition expertise through the Department's use of training or recognition of training programs outside the Department by the Department.

Thirdly, they are changing the type of sampling which will be used in DUI prosecutions and .02 prosecutions or similar alcohol related prosecutions. They ask the committee to delete urine as a potential method of determining alcohol or drug concentration. They are also asking this committee to delete, as well, the provision contained in 61-8-402 which appears on page 3, lines 8 thru 10 under current law which restricts an officer from seeking a drug test if an alcohol concentration test comes back in excess of .10. The reason they are seeking this amendment is that the lab has done analyses of alcohol blood samples which have been sent to the lab for purposes of alcohol analysis and also run a parallel analysis for purposes of drug presence to determine what the prevalence is. They are finding significant prevalence of drug presence in those who have an alcohol concentration of .10 or greater but the Department cannot use that evidence either in the prosecution or in the treatment modality which this person may be subject to under the law because the law specifically says drug testing cannot be asked if we have an alcohol concentration in excess of .10.

Additionally, they are clarifying that blood or breath sampling should be done within a reasonable time after the act alleged. They are making two substantive changes to the current implied consent statute. Those changes are reflected in the amendments which have been passed out to the committee, **EXHIBIT 4.** This would be amendment 3. In additional to allowing implied consent testing for individuals who are arrested for DUI, it will also permit implied consent testing for individuals who are arrested for .02 violation under the age of 21 and it will allow officers to request implied consent testing where they have probable cause to arrest for the DUI but they have not in fact arrested largely because the driver has been involved in a motor vehicle accident, requires medical treatment or care. It is difficult to invoke the arrest and then unarrest the individual to make sure that the county or city who is arresting is no longer responsible for the medical treatment of that motorist. Most states do not require arrest before a implied consent statute is invoked. They are also clarifying the right to an independent test. Often times police officers are charged with impeding an individual's right to an independent test because they have not assisted the individual in transporting the individual to the hospital for this purpose. It is the position of the Department that it is not the role of the police officer to assist an individual in obtaining an independent test. This is reflected in amendment 9 on page 2 of the amendments suggested by the Department. Additional handout - **(EXHIBIT 5).**

Mike Menahan, Lewis and Clark Deputy County Attorney, spoke in favor of SB 106. He prosecutes a number of DUIs in this county. The main provisions of the bill which would be helpful to the

prosecution would be eliminating the provision requiring that a test for alcohol be given first before the crime lab can do a drug screen. This is important when a person's blood alcohol may be .10 or slightly above and there may not be a lot of evidence of unsafe driving. The crime lab is prohibited to run a drug screen on a person whose breath test comes back greater than .10. There may be cases where a person could have toxic levels of barbiturates in their system but the crime lab is not able to run a screen on that and he is not able to introduce that as evidence at trial in order to show that a person is impaired. That information would help both juries and judges in DUI cases. The second matter which would be helpful would be admissibility of the preliminary breath test. Often times when a police officer pulls someone over and they suspect them for DUI, they have a preliminary breath testing device in their vehicle and they ask the person if they will take the PBT test. When dealing with someone who is impaired, they will often take one test but then later refuse another. Or they will refuse a test at one point and agree to take tests later. Often he will get a report from an officer which states the person was arrested, they took a PBT and the results show that they were .2 or .15. When the person is taken to the jail where they have the intoxilizer, that person is given a second opportunity to take a breath test. At that point they refuse. They are arrested, confined, and in jail. At trial, he cannot use the results of the preliminary breath test taken at the scene which showed their blood alcohol to be twice the legal limit. Allowing the admissibility of the results of the PBT tests would help in the prosecution of DUI cases. The last provision was eliminating the provision that a person has to be under arrest before you can ask them to submit to a breath test. When a highway patrolman arrests a person and brings them up to the jail, they have to read them a form which states that they are under arrest for DUI. It is a formality which they all go through. The other day he had a highway patrolman who picked up a woman for her seventh DUI. She pled guilty to a felony DUI and was out on bond pending sentencing. He picked her up after she was in an accident. This was another felony DUI. He brought her to the jail and asked her if she would take a breath test. She did and then he realized that he hadn't read her the implied consent form which stated that she was under arrest. After reading her the form, she said she would not take the test.

Ben Havdahl, Montana Motor Carriers Association, stated the trucking industry has to comply with drug and alcohol testing. This bill brings the standards of .04 into compliance of consistency with those standards of the federal level. They support the changes in this bill.

Charles Brooks, Statewide DUI Task Force, commented they are a volunteer group of various citizens as well as professional law enforcement people throughout the state. They urge the committee to give this bill a do pass.

Bert J. Obert, Officer with the Montana Highway Patrol, voiced his support of this bill because this adds to the ability and the

potential to get as much evidence and provide as much information as possible to the court and jury to help them decide whether or not the person actually was or was not under the influence of alcohol. It is not intended to detract from any of the other tests whether they be physical or chemical that are done at this time. On page 3, line 17, he asked that law enforcement only be required to certify under penalty of law that the person did refuse the test and given the conditions, whether they were under arrest for driving under the influence, driving with a .02 and under 21 or that the person believes that they were involved in an accident. At present time they are required to notarize those statements. They request that they only be required to certify because it is extremely difficult at 2:00 or 3:00 a.m. to find a notary to take care of that information.

Troy McGee, Helena Chief of Police representing Chiefs of Police Association in Montana, stated they are in strong support of this bill.

Jim Smith, Montana Sheriffs and Peace Officers Association, commented they have been involved with the attorney general's law enforcement advisory group over the interim and worked on the development of this bill and it has the support of their association.

Opponents' Testimony: None.

Questions From Committee Members and Responses:

{Tape: 1; Side: b; Approx. Time Count: 30.2; Comments: .}

SEN. GROSFIELD stated it was his understanding that blood testing reveals certain drugs while urine testing reveals other drugs. It was also his understanding that urine testing shows marijuana and other drugs which do not show up in blood testing.

Ms. Nordland commented that part of the rationale for eliminating urine testing is it is not currently being used by any law enforcement agency in the state for implied consent purposes. The other factor in eliminating urine testing is urine, as opposed to breath or blood testing, may indicate only the metabolite of a drug but not the fact that a psychoactive drug is actually present in the body at that time.

Phil Lively, Division of Forensic Science, explained that it is not the fact that they cannot find drugs in blood as opposed to the urine. Urine is much easier to work with. The metabolites are in higher concentrations. If they find the drug in the blood, there is no question as to the fact that at that point in time that drug was having a psychoactive effect on that individual. Finding the metabolite or artifactuals within the urine, they cannot go back and say that individual was being affected by that drug. The Division feels that if they are dealing with the DUI bill to where they need to assess an individual being under the influence of the

drug, they want to make sure the person was being affected by that drug and not merely representing some artifactual evidence.

SEN. GROSFIELD questioned whether marijuana showed up in the blood?

Phil Lively confirmed that it in fact does.

SEN. DOHERTY stated that in 1995 the Legislature, as a matter of public policy, stated that those tests were okay to establish probable cause but were not admissible into evidence in order to determine the amount of alcohol in the blood. Judge McKittrick is a very seasoned judge and during litigation has determined that that evidence is not admissible only because of the legislature's intent but that the PBT is incompetent evidence as to the amount of alcohol on board at that time. Why has Judge McKittrick gone off the deep end here?

Ms. Nordland explained that they are not alleging that Judge McKittrick, or any other judge who has reached a contrary ruling to the position urged here, has gone off the deep end. The case in reference is currently on appeal, the state has appealed it to the Montana Supreme Court. They recognize that part of that analysis did in fact depend on the text of section 61-8-410. In order for them to overcome future challenges to the use of the PBT in the case in chief, that text must be changed if it is read as a limitation upon the use of the PBT evidence. In terms of the reliability and the accuracy, they believe that Judge McKittrick erred. The Forensic Science Division has no qualifications about the preliminary breath testing instruments providing an accurate and reliable estimate of alcohol concentration in a person's body in terms of a roadside detection.

SEN. DOHERTY commented the public policy issue is that we want to make law enforcement's work a little easier and we want to get drunks off the road, however, in determining the scientific reliability there is conflicting testimony that deals with an individual being around .09 or .11 where that reliability of PBT makes it in Judge McKittrick's interpretation incompetent evidence.

Ms. Nordland stated that courts have ruled contrary to the position being espoused by the Department today. What this body needs to consider is that PBT test results will not be used in isolation in the case in chief. The decision to arrest and go forward on the DUI is based on a constellation of factors which may include the officer's observation of impaired driving, the discourse between the officer and the individual at the time of the stop, the individual's appearance, the odor of alcoholic beverage, the individual's speech and also an assessment of psychomotor skills. The Department is asking the committee to give the PBT results, the estimate of alcohol concentration, as least as much value in terms of competent evidence in assessing whether an individual was under the influence of alcohol as we are currently comporting officer

observations, HGNs and field sobriety tests which are routinely admitted in DUI prosecutions.

SEN. SUE BARTLETT asked for information relating to the reliability of the instruments which are used to administer the preliminary testing?

Mr. Lively started by describing the procedure by which all instrumentation must go through before they are even distributed to law enforcement. The Division of Forensic Science first gets approval from the National Highway Traffic Safety Administration, Department of Transportation for all instrumentation used. Those items are then placed upon the conforming products list of the United States. At that time, those instruments then are made available for review by the other states. In their program, when they use an instrument approved by the Department of Transportation, they take the same instrumentation and put them through subsequent accuracy, precision, and reliability testing. This is not only for the major units but also for the hand held PBTs. They must demonstrate their accuracy within a specified range. They must demonstrate that they have repeatability. There are 30 different hand helds on the market today. They have approved five.

SEN. BARTLETT asked what kind of maintenance is enforced to make sure that the ones actually in use are staying up to standard.

Mr. Lively answered that they have instrumented a continuing accuracy verification program on the instruments. The instruments must have a known alcohol standard run on them at least once every 31 days using either an alcohol liquid or gas. Trained personnel conduct the tests and keep an ongoing record of the accuracy verifications of the instrument. Because the PBTs are newly introduced into the state, they do not know what the maintenance course will be. They have an annual maintenance on their other instruments and he assumed they would have the PBTs meet the same qualifications.

SEN. SHARON ESTRADA asked what the situation would be for someone who was driving eradicably due to the influence of drugs and is taken into custody to be tested for DUI but no alcohol is found in his system?

Chief of Police McGee explained that they could be tested for drugs if they test below .10 on their alcohol test.

SEN. GROSFIELD asked if each instrument was tested or just the brand?

Mr. Lively answered that they do not have the capacity to test each instrument. Prior to the instrument being purchased, the manufacturers will supply the Division of Forensic Science with representative instrumentation. Those are the instruments which they test.

SEN. GROSFIELD asked if there is variation in how accurate they are by brand.

Mr. Lively stated the instrumentation must fall within a five percent accuracy for acceptance.

SEN. GROSFIELD stated that there is a certain range where they are not entirely accurate.

Mr. Lively commented there is nothing which is zero percent accurate. A five percent accuracy is in excess of medical standards for diagnostic instrumentation. As far as a test of .10, could that be a .105? Yes. Could that be a .095? Yes. Is that a significant alcohol concentration? Absolutely, it is. They do not look at just the fact that they got a number. It is the totality of all tools available.

Closing by Sponsor:

{Tape: 2; Side: a; Approx. Time Count: 8.8; Comments: .}

SEN. VAN VALKENBURG stated the fiscal note was prepared with some worse case scenario assumptions. The bill has a negative impact on the General Fund of $219,000 in the first year of the biennium and $86,000 in the second year. This assumes that the Forensic Science Division is operating at full capacity and needs additional equipment and personnel to perform these tests. The Department is probably willing to take this bill without funding for the coming biennium because of its desire to deal with the significant issues in the bill. The total fiscal impact deals with the language in the bill which is being stricken on page 3, lines 9 and 10. While it is true that the State of Montana has a prohibition about driving motor vehicles with a blood alcohol concentration in excess of .10 what they are primarily talking about is driving under the influence of alcohol prosecutions, not per se prosecutions. In that regard, the issue of .10 is only an evidentiary issue which gives rise to an inference that a person is under the influence of alcohol. It is still possible to prosecute someone who has a blood alcohol concentration less than .10 and it also means that if they are in excess of .10 they are not necessarily guilty of driving under the influence of alcohol. This bill becomes necessary because they have found out through court decision and application of the laws that our statutes can be improved and fine tuned.

EXECUTIVE ACTION ON SB 36

{Tape: 2; Side: b; Approx. Time Count: 12.9; Comments: .}

Amendments: sb003601.agp **(EXHIBIT 6)** - Amendments 1 and 2

Discussion:

CHAIRMAN CRIPPEN stated there was an amendment which dealt with section 178, page 174, line 18.

Valencia Lane commented that Jackie Lenmark pointed out the problem of striking a date which was thought to be non-substantive, it really was a substantive change. The question was how to amend the section in the bill to put back the date and eliminate the problem. Greg Petesch prepared the amendment which was also discussed with Ms. Lenmark. The amendment, on page 174, line 20, inserts "no later than December 31, 1990" and on line 21 it strikes "establish" and inserts "order the establishment of" which would return it to existing language.

Motion/Vote: **SEN. HALLIGAN MOVED TO AMEND SB 36.** The motion carried unanimously.

Motion/Vote: **SEN. HALLIGAN MOVED SB 36 DO PASS AS AMENDED.** The motion carried unanimously.

EXECUTIVE ACTION ON SB2

{Tape: 2; Side: b; Approx. Time Count: 17.2; Comments: .}

Amendments: sb00201.avl **(EXHIBIT 7)** - Amendments 1, 6, and 7.

Discussion:

SEN. RIC HOLDEN explained the first amendment came from the construction industry. Repair and maintenance was changed to the removal of litter and graffiti from roads, etc. Amendment 1, 6, and 7 all deal with limiting the bill to the removal of litter and graffiti.

Motion/Vote: **SEN. HOLDEN MOVED TO AMEND SB 2 WITH AMENDMENTS 1, 6, AND 7.** The motion carried unanimously.

Amendments: sb00201.avl **(EXHIBIT 7)** Amendments 2, 3, 4 and 5.

Discussion:

Ms. Lane stated that at the hearing, Lois Adams handed out a technical amendment. Ms. Lane suggested two technical amendments which Ms. Adams agreed to and those appear as no. 2 which puts a reference into the title to a section which was being amended. Amendment 4 deals with a error when the bill was drafted. This bill takes prison industries out of Title 53, Chapter 1 and left this in Title 53, Chapter 30. The amendment requested by Ms. Adams appears as amendment 5 which inserts a subsection (f) into this section. It was necessary because the bill amended 53-1-301 and stripped everything relating to prison industries which was applicable and put it into Title 53, Chapter 30. Subsection (f) was overlooked.

Motion: **SEN. HOLDEN MOVED TO FURTHER AMEND SB 2 WITH AMENDMENTS 2, 3, 4 AND 5.**

Discussion: **Ms. Lane** commented the third amendment would strike a reference to 53-31-31 and insert the reference to 53-31-32. This was a technical error.

Vote: The motion carried unanimously.

Motion: **SEN. DOHERTY MOVED TO FURTHER AMEND SB 2.**

Discussion:

He asked to amend page 6, lines 9 and 10, striking the language "in order to insure the public safety, the Department may secure inmates performing work." He made this motion because he does not trust the Department of Corrections. The testimony during the hearing was that under Rick Day there would not be any inmates who were secured in either cables, chain gangs, velcro or scotch tape working on public projects to remove litter and graffiti around the Montana State Prison. Directors of the Department of Corrections come and go, the next director may do these things. Although we were assured only minimum and moderate security inmates would be allowed to perform this kind of labor, he does not believe that if these people need to be secured to secure the public safety that they should be outside the Montana State Prison walls. He asked Rick Day if he knew of any states that were moving in this direction. He did not.

SEN. GROSFIELD asked **SEN. DOHERTY** if the word secure would always apply to a physical restraint or if it included supervision.

SEN. DOHERTY believed that in this instance it meant tying them together. He would hope that inmates being transported are secured.

SEN. GROSFIELD stated he would oppose the amendment because you never know what could be found along the roads. If the inmates were picking up litter and someone found a gun, he would feel more secure if the inmates were secured. On line 18 it does say that they would have demonstrated sufficient reliability and trustworthiness. When these people are in public, the public safety would be much better served if we did allow security.

CHAIRMAN CRIPPEN stated that if we are going to allow this type of activity and we do not secure them in some way, including the use of physical restraints, if an act is committed against someone we are opening up the door for liability. This amendment would provide more problems than we would want to have.

SEN. DOHERTY closed by stating this is a worthwhile bill in transferring the responsibility to the Department of Corrections. **SEN. HOLDEN** has indicated he does not want this bill to be a chain gang bill. If they are secured or not secured, if one of them creates a crime in terms of the state's liability, the question would be if the state did an adequate job of trying to determine whether this individual was a minimum or a moderate

security risk. He has a problem giving discretionary authority to the Department of Corrections, which does not have a very stellar record in the last few years because of an employee almost beaten to death, a major riot, etc.

Vote: The motion failed with **SEN. HALLIGAN, BARTLETT** and **DOHERTY** voting in favor of the motion.

SEN. HALLIGAN questioned if there was some way to take the chain gang language out of the bill. He asked for a sense of the committee.

SEN. GROSFIELD stated that would not satisfy his scenario of picking up the gun. He would like to leave the discretion in the bill.

SEN. ESTRADA concurred with **SEN. GROSFIELD.**

SEN. REINY JABS wanted the discretion left with the Department.

SEN. HOLDEN concurred with **SEN. GROSFIELD.**

Motion: **SEN. HOLDEN MOVED SB 2 DO PASS AS AMENDED.**

SEN. GROSFIELD stated the fiscal impact is a half million dollars. He asked **SEN. HOLDEN** if he felt that would change any.

SEN. HOLDEN stated the fiscal note had a lot of latitude. This is not mandated legislation thus it is not necessarily required that this legislation be funded to pass. At this point it is more of a policy decision regarding potential rehabilitation for the inmates.

SEN. DOHERTY stated that as a matter of policy within the state of Montana he did not agree with the bill. If this bill would encourage people to work or develop skills, he would be for the bill. If this bill is used as a trophy or to show how tough we are on crime, it doesn't do the job at $533,000.

CHAIRMAN CRIPPEN stated this deals with the work aspect for the incarcerated individual.

SEN. BARTLETT asked Ms. Lane if the amendments which were adopted addressed the technical concerns on the fiscal note.

Ms. Lane stated they might have answered the first one.

ADJOURNMENT

Adjournment: The meeting adjourned at 12:15 p.m.

SEN. BRUCE D. CRIPPEN, Chairman

JUDY KEINTZ, Secretary

BDC/JJK