MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON STATE ADMINISTRATION

Call to Order: By **CHAIRMAN DON HARGROVE**, on March 13, 1997, at 10:00 a.m., in Room 331

ROLL CALL

Members Present:
Sen. Don Hargrove, Chairman (R)
Sen. Kenneth "Ken" Mesaros, Vice Chairman (R)
Sen. Vivian M. Brooke (D)
Sen. Delwyn Gage (R)
Sen. Fred Thomas (R)
Sen. Bill Wilson (D)

Members Excused: None

Members Absent: None

Staff Present: David Niss, Legislative Services Division
Mary Morris, Committee Secretary

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

Committee Business Summary:
Hearing(s) & Date(s) Posted: HB 389, HB 521, HB 534
Executive Action: HB 361

EXECUTIVE ACTION ON HB 361

Amendments: HB036101.adn (**EXHIBIT 1**)

Discussion:

Chairman Hargrove explained the amendments. They have dealt with 5, 7, 8, 9, 11 and 14 and the rest are to be considered jointly.

Mr. Niss explained that the effects of paragraphs 3 and 4 of the amendment is that this would exempt from the posting requirements, household pesticides that are approved by the Department, pursuant to 88-212, for household use. Commercial pesticides are the only pesticides which would be required to be posted for their application. Six is connected to the permanent signing, if regular application is required. Paragraph 10 deletes the date of application from the posting requirement. Paragraph 12 substitutes the phone number from which the person

concerned about the application of pesticides, can get other information. Paragraph 13 deletes the phone number of the building operator. Paragraph 15 amends the record retention date and requires that the records concerning the particular application be maintained for two years rather than five years. Paragraph 17 gives a local governmental unit three months to amend any regulation or ordinance that does not comply with the requirements in the bill after it becomes effective.

Motion/Vote: **SEN. KEN MESAROS** moved to **ADOPT HB036101.adn.** The motion **CARRIED UNANIMOUSLY.**

Discussion:

CHAIRMAN DON HARGROVE explained that he talked to **Pam Langley**, who represented the applicators, and she pointed out the only conflict between the bill and the amendments with an integrated pesticide management program, is the notice requirement. The current bill, at page 1, line 24, requires notice 24 hours before application. The reason is that it would be hard to time all of the steps which need to be taken in an integrated test management system with the 24 hour pre-notice requirement. The amendment, in paragraph no. 7, would delete that and insert "at the time of the application".

SEN. DELWYN GAGE remarked that maybe this conflicted with (4) in the bill which states that a local government may not adopt standards that are more stringent than the standards established in (2) and (3). This says they can adopt standards more or less stringent. Is a public agency different than local government?

CHAIRMAN HARGROVE felt there was a conflict between (4) and the amendment which **REP. HARPER** proposed.

SEN. MESAROS stated he spoke with **REP. HARPER** about the necessity for that language in the bill and reminded him that it was unnecessary because if the bill is signed into law, unless there is an exception provided in the bill, a local government unit can adopt a local ordinance that is either less or more stringent.

Motion/Vote: **SEN. MESAROS** moved that **HB 361 BE CONCURRED IN AS AMENDED.** The motion **CARRIED** with **SEN. GAGE OPPOSED.**

HEARING ON HB 521

Sponsor: **REP. BILL RYAN, HD 44, GREAT FALLS**

Proponents: **Jeff Miller, Department of Revenue**

Opponents: **None**

Opening Statement by Sponsor:

REP. BILL RYAN, HD 44, Great Falls, introduced HB 521. This bill is an act revising the general rules for determining residency providing that a claim of residency for any purpose establishes a person's residency for all purposes. The Department of Revenue has an amendment and he is in support of the amendment.

Proponents' Testimony:

Jeff Miller, Department of Revenue, presented their amendments, (**EXHIBIT 2**), and stated their support of the bill with amendments.

Opponents' Testimony: None

Questions From Committee Members and Responses:

SEN. GAGE commented there could be a situation wherein during the year a person would change his decision as far as Montana residency is concerned. He could file a tax return as a non-resident and then decide in August to become a Montana resident and buy a hunting license as a resident of Montana. Would they just take his word for that?

Mr. Miller explained they would be looking at a part-year resident return for that year. It takes the combination of action and intent to abandon a person's residence. It is somewhat subjective. Intent issues are things such as: Where do you vote? Where does your family reside? Where do you buy hunting and fishing licenses? Where do you bank? It tends to be case specific. This bill with amendment would suggest that if a person is going to claim residency in Montana for voting, hunting or fishing, they are a resident for all other purposes, too.

SEN. GAGE had concerns with (3), line 19 and 20, which stated that a change of residence may be made only by the act of removal, joint with intent to remain in another place. If people spend six months in New Mexico and six months in Montana, where is their residence?

Mr. Miller explained it will take something to demonstrate that you have actively abandoned your Montana residence and established it somewhere else.

CHAIRMAN HARGROVE asked if this would be policed by the Department of Revenue by a computer record match?

Mr. Miller clarified that they look at things such as, did the person file a federal return from a Montana address, where do they bank, etc. Where you are temporarily absent, that should not complicate your life because you have not taken other actions

to demonstrate that you are intending to abandon your Montana residence.

CHAIRMAN HARGROVE, referring to the fiscal note, questioned whether there would be a significant amount of effort required by the Department of Revenue for policing and also if there was income revenue tax involved?

Mr. Miller did not see any increased administrative costs for the Department. This bill says that if you indicate you are a Montana resident for any purpose, that is evidence to say that you are a resident for all purposes, which means income. It will certainly produce more revenue, because they are constantly surfacing the non-filers.

SEN. BILL WILSON asked what a person needed to have physically to declare residency in Montana? Does a P. O. Box suffice?

Mr. Miller explained they asked for permanent address, social ties, religious ties, etc.

SEN. WILSON posed the scenario where he told the Department that he has a P. O. Box in Great Falls, Mt. and he has sold his property and is not renting anything and is in Bolivia.

Mr. Miller clarified it does not require a physical presence to be a Montana resident. A person can't acquire a new residence until he/she abandons the old. This isn't black and white.

SEN. WILSON questioned the income tax situation of the above person.

Mr. Miller explained that a resident of Montana is required to report all income from all sources and pay tax in Montana. To the extent that they paid a tax in another jurisdiction, we will allow a credit. They will not double tax.

SEN. MESAROS questioned whether there was consistent criteria between agencies as identifying Montana residents?

Mr. Miller remarked that the language as proposed is allowing statutory exceptions. There are exceptions for instance in the university system to say what constitutes an in-state resident versus a non-resident for purposes of tuition. They are very consistent with Fish, Wildlife and Parks and trade information back and forth.

SEN. MESAROS asked how much time would be allocated by his Department for this legislation?

Mr. Miller explained they had between 8 and 10 individuals in their compliance section who do nothing but chase down under-reported income and non-filers. They do computer match cross-references. Approximately 25% of their exam effort is spent on

cross-match activities. It is productive. They have assessed about $6 million from their compliance effort specific to all kinds of compliance issues.

SEN. GAGE raised concern with (3) which stated that a change of residence may be made only by the act of removal joined with intent to remain in another place. This would put the burden of proof on the taxpayer.

Joe Kerwin, Secretary of State's Office, clarified that Title 13 in election laws has a similar provision which states that there are too many residences for election purposes. They would have no problem with taking that language out. Current law, (6) states that residence can be changed by the union of act and intent.

Closing by Sponsor:

REP. RYAN stated they are trying to stop the practice of buying a fishing license as a non-resident, voting as a resident, and then stating you are a non-resident when licensing a vehicle. If you say you are a resident, you are a resident.

{Tape: 1; Side: A; Approx. Time: 10:33 a.m.; Comments: End of Tape 1, Side A.}

HEARING ON HB 534

Sponsor: **REP. JACK WELLS, HD 27, BOZEMAN**

Proponents: **Herb Richards, construction contractor**
Carl Schweitzer, Montana Contractors Assoc.
Dean Bjerke, Diamond Construction
Gary Hoovestal, CEO of Greenway Enterprises

Opponents: **None**

Opening Statement by Sponsor:

REP. JACK WELLS, HD 27, BOZEMAN, introduced HB 534. According to current law, the state is not liable for interest in certain kinds of contracts. He felt the state should be liable for interest in certain cases, particularly when there is a court judgment involved and the judgment is against the state. This could cause a problem for the state involving contracts for retirement systems. He didn't intend that when he drafted the bill. An example, pointed out to him this morning, was of a person who retired some years ago and elected not to take their retirement. Now they have applied for their retirement. His bill would make the state liable for interest in that retirement contract and that would amount to a sizeable amount of money. An amendment has been recommended, and he agrees with it. It would add a third section after (2). It would state that the

provisions of this section do not apply to retirement system contracts administered by the State of Montana. The problems have arisen in construction contracts.

Proponents' Testimony:

Herb Richards, construction contractor, explained that his son had a contract job in Libby in the 1980s and had a dispute with the Department of Transportation over a claim on his work, which was the clearing of the roadway. It took until 1995 to get it into court. It was appealed to the Montana Supreme Court. They ruled a year ago to settle the case. The claim is still not settled. Under the present statute, the Department does not have to pay interest to their citizens on claims or judgments. If the state has a claim against you, you will pay interest to the state. The citizen needs to be treated in the same manner. Because the state did not make a total payment, his son lost his home, business and equipment. He is still paying interest on some of the notes. This will force the Department to negotiate and work on a fair settlement without dragging things out for years.

Carl Schweitzer, Montana Contractors Assoc., rose in support of the bill. If contractors are liable for their interests both to the public and to people they buy machinery and equipment from, it is only fair that the state should be liable.

Dean Bjerke, Diamond Construction, stated this is a fairness issue. The State of Montana and the federal government require them to pay interest on their liabilities. He is not concerned only with judgments, but with normal contract payments that are due in 30 days. As a contractor, he shouldn't have to hound the State of Montana to get paid in a timely manner.

Gary Hoovestal, CEO of Greenway Enterprises, remarked the bill makes sense for financial and fairness reasons. If the government is holding the contractor's money it is getting interest on the money. The contractor has to use his cash reserves or borrow money. If the contractor is forced to go to dispute resolution to collect money that is due, there are a lot of additional costs. If the contractor prevails, the losing party should have to pay lawyer fees and court costs. This bill will correct an existing, unilateral, unjust advantage that the state has.

Opponents' Testimony: None

Informational Testimony:

Kelly Jenkins, Public Employees Retirement System, presented their amendment, (**EXHIBIT 3**). He also presented his written testimony, (**EXHIBIT 4**).

Bill Gianoulias, Chief Defense Counsel, Risk Management and Tort Defense, Department of Administration, stated they have concerns about this bill because it is a broad bill which covers a narrow issue. He presented amendments, (**EXHIBIT 5**). He stated this could be limited to construction contracts which would eliminate some of the problems. The body of the bill doesn't say whether interest is due only on judgments. It is not consistent with the title of the bill. Under MCA, 17-8-242, contractors can get interest at 18% a year, if the contract is not paid within 30 days. There is a good faith exception to that in 17-8-242 which states that if the state has a good faith dispute, they do not have to pay that interest. That also causes a problem with 25-9-205 which talks about 10% interest per year. Under MCA, 25-10-711 attorneys fees can be awarded if the state defends in bad faith or frivolously. The bill provides two separate approaches to attorneys fees and costs. It says attorneys fees and costs are discretionary under Title 25, bad faith, where there is not bad faith, there is no discretion, attorneys fees and costs must be awarded.

Subsection (1)(b) of the bill says the State of Montana is liable for interest from the date on which the payment on the contract became due. There is no definition of what "became due" means. They have, in their amendments, simply eliminated (b).

Questions From Committee Members and Responses:

SEN. VIVIAN M. BROOKE asked if **Mr. Gianoulias'** amendments were presented in the House? **REP. WELLS** explained that they were not pointed out until this morning.

SEN. BROOKE asked if there was a reason the fiscal note was not signed? **REP. WELLS** stated he did not have an objection to it.

SEN. MESAROS felt the information testimony sounded more like an opponent's testimony. **Mr. Gianoulias** stated some of the problems were brought on by House amendments. He would be happy to work with the sponsor to iron out some of the problems.

SEN. GAGE asked if the exception language in (2) meant that interest would be paid on a judgment for the time up until the judgment is entered but the state has two years after that judgment is entered to pay without any penalty or interest from that day forward. **David Niss** explained that this was to coordinate the current provisions of 317 with 404(d). The only new language in Section 2 is lines 26 and 27. Without the exception on lines 26 and 27, sections 1 and 2 of the bill conflict.

CHAIRMAN HARGROVE asked why they were proposing to strike (b)? **Mr. Gianoulias** felt this was taken care of in Section 1. It provides for interest, and tells what interest rate and the place to look to award the interest, it refers to 17-8-242.

SEN. GAGE asked how this addressed mediations which were handled without going to court? **Mr. Niss** explained the state would have incentive to settle earlier with this bill.

SEN. GAGE remarked that with this bill they do not necessarily need a judgment to have the interest continue. **Mr. Niss** stated that a contractor may have to obtain a judgment in order to collect it.

Closing by Sponsor:

REP. WELLS stated this bill should put the state in a position where they want to negotiate. He has a bit of a problem with the amendment presented by **Mr. Gianoulias** as far as how the interest rate is provided in (b) by 25-9-205 versus where 17-8-242 applies. The problem is the good faith/bad faith wording, a bad faith judgment can be difficult to obtain. Greg Petesch suggested using 25-9-205. He does not like the 1st and 2nd amendments presented. The option two amendment is a good addition to this bill in that it defines prevailing parties.

The basic intent of this bill is to make the state liable and treat citizens of the state fairly. This would provide an incentive for the engineers and contract people who work for the state to do a good job in the initial bidding and letting of contracts.

{Tape: 1; Side: B; Approx. Time: 11:12 a.m.; Comments: End of Tape 1, Side B.}

HEARING ON HB 389

Sponsor: **REP. BRUCE SIMON, HD 18, BILLINGS**

Proponents: **None**

Opponents: **Annie Bartos, Chief Legal Counsel, Department of Commerce**
Beth Baker, Assistant Chief Deputy Attorney General, Department of Justice
Russ Cater, Chief Legal Counsel, Department of Public Health and Human Services

Opening Statement by Sponsor:

REP. BRUCE SIMON, HD 18, BILLINGS, reported that, over the past couple of years, he has run into some problems dealing with the whole issue of public notification and rulemaking. He noted that this is a problem all Legislators struggle with, in a variety of ways, but indicated that he has discovered there are some problems with the way the public is notified of what State government is doing that involves the citizens and, a lot of time, people do not know what is being done. He displayed a copy of the *Montana Administrative Register*, asked how many Committee

members recognized it, and then stated that this is where all of the rule notices, and that sort of thing, are printed, and that it is published about every two weeks. He said that he gets them, now, that Legislators can get them at no charge, and then asked who do they think gets that book, and is it adequate notice, that most of the names on the list to receive the *Montana Administrative Register*, approximately 230 names, are other government agencies, and a few law firms which deal State agencies. He reported that the cost to non-Legislators is $300 a year, and stated that it is unreasonable to expect citizens to spend $300 a year for the *Montana Administrative Register* in order to keep up with what their government is doing.

REP. SIMON remarked that government agencies have taken the tact that printing in this is adequate public notice, and asked the Committee if they think it is, stating that he does not, that he does not think it is adequate public notice when the public really does not get this, the public does not read this and, if they did get it, it would cost them $300 a year to be informed. He added that he, as a Legislator, has been asked to be informed on a number of issues, and that sometimes he is informed, sometimes he is not. He said he thinks there is a need to improve the definitions, and tell the departments when they need to notify people, and when they do not. He referred to page 2, lines 13 through 15 of the bill, and explained that this will address what is a matter of significant public interest, noting that there were some changes in the House, but that, basically, it is an agency action or decision that involves a matter the agency knows to be controversial, has a significant fiscal impact on a particular class or group, or is of significant interest on the part of citizens, that he thinks that is pretty reasonable. He added that, when that is met, there is need for the department to take additional steps to notify the public, that printing in the *Montana Administrative Register* is not good enough when there is a matter of significant public interest. He pointed out that, in various departments, including the Department of Commerce, the adoption of a rule is considered a matter of significant public interest, that this is set out in their rules. He indicated that this bill provides that adoption of a rule is considered a matter of significant public interest and, as such, triggers some additional public notification.

He then referred to Section 3, and stated that they tried to make it "user friendly" for the public by making it clear that agencies are required to maintain lists of interested persons, to let the public know that they do maintain these lists, indicating that the departments do not tell people that they maintain these lists, and this will require them to notify the public that they maintain a list of interest persons, and how to get on that list. He reported that people have told him they asked to be informed on agency actions, but perhaps did not use the correct terminology, and were not placed on the list. He cited the example of the Building Department, stating that he knows there were specific requests by the Homebuilders of Billings to let

them know what the Department was doing, but they were not contacted when rules were changed or adopted, that they were not on the list of interested persons, even though they had specifically requested to be on the list, and this bill will clarify that the departments do have a responsibility, that they will maintain those lists and, when someone asks to be on the list, they will be placed on the list until they ask to be taken off the list. He noted that these lists are purged every year and everyone has to reapply, that the department can verify these lists but, until a person requests their name be removed, they should remain on the list.

REP. SIMON noted that he believes the people who will be testifying are primarily opponents, that they are, for the most part, representing government agencies and have some additional problems with this bill, but explained that the basis of this bill is to try to involve the public in the process. He stated that we don't represent government, we represent people and, as such, this is letting the people be part of the process, which is what he is trying to do. He added that he is not trying to make this a real onerous thing, but can tell the Committee what agencies think of it, that they write fiscal notes, and he drew the Committee's attention to the fiscal note, (**EXHIBIT 6**) indicating that letting the public know what agencies are going to do will cost over $6 million, according to the original fiscal note. He said that he thought it was ridiculous and laughable, that he would not bother to sign such a laughable fiscal note, but reported that they amended it in the House to address some of the concerns that every time someone showed up at an agency, that person would have to be put on a list. He stated that this was not his intent, and he is not trying to make it that onerous on the departments, noting that they have huge mailing lists. Regarding the $6 million a year, he gibed that a Senatorial Campaign in this State did not cost that kind of money, even though there were huge media advertisements. He then indicated that, originally, there was a requirement for newspaper advertisements, but this has been changed to news releases or other means. He noted that he was really offended by the fiscal note.

REP. SIMON then indicated that he wanted departments to communicate in plain English. He showed the Committee an advertisement in the February 9, 1997 ***Billings Gazette***, and pointed out how illegible it is due to its size, and the amount of information contained in the ad, adding that they are written in a way so as to be difficult to understand. He read the advertisement for the Committee's benefit, emphasizing how difficult it is to understand, and stated that the public notice is there, but he does not know what they are talking about, that it is not clear to him, and it seems to him that they should say it a little more plainly, to let the public know what they are really talking about. He indicated that he thinks he has said enough in his opening, that he appreciates the Committee's attention, and said that he expects the Committee will hear from

others, noting that he did not make the attempt to bring in a lot of citizens to speak on behalf of the bill, although he thinks there are a number who are very interested in this bill as they recognize this is important to their ability to reach and effect what government is doing to them. He said he would appreciate the Committee's consideration, and the opportunity to close.

{Tape: 1; Side: B; Approx. Time:11:25 a.m.; Comments: None.}

Proponents' Testimony: None

Opponents' Testimony:

Annie Bartos, Chief Legal Counsel, Department of Commerce, stated that the Department does not support HB 389. She commended the work that **REP. SIMON** has done on this bill, indicating that they all see the need for the citizens of the State of Montana to become involved in the processes of State Government, but pointed out that there are some problems that exist with this bill. She distributed copies of amendments, (**EXHIBIT 7**) indicating that they are recommendations from the Department. She referred to page 2, line 14 of the bill, the definition of significant interest to the public, and explained that the amendment she would recommend is an attempt to more clearly define controversial, to indicate that a decision is controversial to more than just one person, but would involve a controversy between two or more groups of citizens. She pointed out that, if a person has a contested case proceeding involving one of their occupational licensing boards, under this bill as written, that individual would be impacted by this proposed legislation. She then referred to number 9 of her amendments, which amends page 3, line 19 and 20, and reported that the Department recognizes that the bill proposes notice requirements, and indicated that news stories would be published, and the State Bulletin Board would pick up notice of the Agency action. She stated that the problem is the 12 point type advertisements, and pointed out that would essentially be regular newspaper print, that it would not be the small legal notice section of the newspaper, and would be an additional cost to State government for running those notices in the newspaper. She indicated that their recommendation would be to strike that language. She then referred to page 5, line 28 through 30, and reported that the bill provides for an award of attorney fees to non-attorneys in the event the citizen should prevail in an action against a State agency for not complying with the open meeting law. She said that the Department proposes that this language be stricken, and indicated that the danger they face as State officials, as well as Legislators and the Judiciary Branch, is that there are frivolous law suits being brought by prison inmates, by the militia, by the Freeman, and this will only encourage those type of legal actions against State agencies.

Ms. Bartos indicated that numbers 16 and 17 of the proposed amendments relate to page 10, line 8 of the bill, regarding the

provision for emergency rule power given to agencies if there is a finding of imminent peril to public health, safety and welfare. She indicated that the Department recommends the language existing in current law continue to exist, that it gives a citizen the right to seek judicial review of emergency rules that have been promulgated by an agency, that this bill provides for an immediate judicial review, and it may only be brought by one person. She explained that the Department's concern is that one citizen may be able to tie up important emergency rule-making authority of a department. She noted that there are additional amendments which are more minuscule, that they are the substantive amendments, and she would be more than willing to work with **REP. SIMON** in working through this bill.

Beth Baker, Assistant Chief Deputy Attorney General, Department of Justice, said she is reluctant to comment to this bill because the Department is a strong proponent of public participation in government, indicating that the Attorney General has issued many opinions upholding the public's right to know and to participate. She stated that she is speaking to only one section of the bill, a section that really does not have anything to do with the rest of the bill, or with public participation in government, and that is Section 8, on page 5 of the bill. She noted that **Ms. Bartos** alluded to this, and explained that this section would constitute a substantive grant of attorneys fees in all cases brought under Article 2 of the Montana Constitution. She referred to line 27 of page 5, pointing out that the language "section 9" has been stricken, and indicated that section 9 is the right to know provision of Article 2, and explained that, in current law, this section allows the plaintiff to recover attorneys fees in an action brought to enforce the right to know and, by striking those two words, it authorizes attorneys fees in all cases brought under Article 2, which is the Declaration of Rights Article of our State Constitution, that it includes freedom of speech and religion, searches and seizures, and all sorts of rights granted to criminal defendants, which is the primary reason for her appearance here today. She indicated that she does not believe that section of the bill is related to public participation in government, that it is not reflected in the title of the bill, and comes as a surprise, adding that they have particular concern about encouraging frivolous inmate litigation against the State, particularly in post-conviction proceedings that their offices handles. She explained that criminal defendants are allowed to bring a civil action challenging the legality of their conviction or sentence after the whole criminal appeal process is over, and reported that, in 1996, they opened 70 new post-conviction cases brought by inmates challenging their convictions and, in almost every case, they alleged some violation of the Constitutional right. She noted that the State wins most of those cases, but that they all involve a substantial commitment of time and resources, adding that they have been making efforts this session to try to discourage frivolous inmate litigation, and they believe this section of the bill will only encourage it.

Ms. Baker then indicated that attorneys fees in civil cases are already recoverable against the State, under current law, if the State's position is found to be frivolous or pursued in bad faith, that this is in Section 25-10-711. She distributed copies of the statute (**EXHIBIT 8**), and stated that they believe this section already grants protection against abuses of government power, and that further provision for an award of fees is not necessary. She added that, beyond that, the use of the term "prevailing", the award of attorney fees, alone, will or can generate litigation, and this is not unlike a provision in Federal law that allows people to recover, if they are the prevailing party in actions to enforce their civil rights. She pointed out that there is a lot of litigation in the Federal courts over what that means, noting that "prevail" does not necessarily mean that you win the case, that, if you prevail on an issue, you may be entitled to attorneys fees under the Federal law, and they are concerned that, in a lot of the prison cases, sometimes the court does find that there was an error at trial, but that it was not substantial enough to reverse the conviction and that, even in that case, they could be faced with litigation over awarding an inmate 90% of what an attorney might have gotten with respect to the single issue on which the inmate prevailed.

She reported that she had several discussions with **REP. SIMON** about this bill when it was in the House, and that she asked him to take out this section, that he did not want to do that, but he did, at her suggestion, attempt to make it reciprocal because, if the State is entitled to recover fees, then perhaps it will discourage some of the frivolous litigation. She said that she appreciates his attempt to do that by substituting the word "party" for the word "plaintiff", but indicated that this discussion was held shortly before amendments were made on the floor, and she does not think the amendments accomplish making it reciprocal because use of the word "party" on line 27 means that it has to be an action brought to enforce the party's rights under Article 2 in order for a party to recover. She pointed out that, in all of the cases she has talked about, they would not be talking about the State's rights under Article 2, that they are always talking about the individual's rights. She further pointed out that, because the Montana Supreme Court has held, in a case decided in 1989, that even where a statute grants a right to recover attorneys fees, that does not apply to the State or political subdivision because the State pays the lawyer his salary, and it would not matter, that the lawyer would be paid that salary anyway, so the State is not entitled to recover fees. She said that the statute would have to be specific in order for the State to recover fees. She encouraged the Committee, if they are inclined to favorably consider this bill, to strike Section 8.

Russ Cater, Chief Legal Counsel, Department of Public Health and Human Services, presented written testimony (**EXHIBIT 9**), and stated that he opposes this bill on behalf of the Department of Public Health and Human Services, as well as on behalf of the

Governor's Office, speaking for other government agencies. He reported that the Governor and, he thinks, the State agencies firmly believe that there is a need to have public participation in government, that this right is in our Constitution and in State statutes, and they also encourage public participation in current statute through the Administrative Rules, as well as the statutes which require that a mailing list be adopted with respect to the adoption of rules. He stated that he wants to convey the point that they do encourage public participation, and there are current statutes which adequately protect the public's rights in participation in government. He indicated that **REP. SIMON** gives the impression that his main concern is for administrative rules, and so, therefore, this bill is necessary to make sure that State agencies are providing notice to the public of administrative rules. He noted that the only problem is that this bill goes way beyond administrative rules, that, if they were just dealing with administrative rules, they could probably delete the first 12 sections, and pass the rest of the bill, that the first 12 sections deal primarily with things other than administrative rules. He reiterated that current law requires mailing lists for administrative rules. He stated that he will agree with **REP. SIMON** that the *Montana Administrative Register* is probably not a real good method of conveying notice to the public about rules that agencies are going to adopt, but pointed out that, if this Committee and the Legislature is intent on making sure that government agencies are giving more notice to the public, they have to realize that there is a cost associated with that. He remarked that some Legislators may not trust agencies to provide the notice and asked, if this is true, why not establish an appropriation within the Secretary of State's office, where administrative rules are promulgated and published, and have the Secretary of State's office publish notice of rules in the paper. He indicated that one of the reasons why the Department does not publish all administrative rules in the paper is that, in many instances, administrative rules are not that controversial. He then noted that they probably are controversial, but the reason that there may not be much objection to the rules is because of the fact that they are doing it because of mandates from the State Legislature, usually because of costs that should be changed in provider rates, or in benefits to recipients, and they are following just an implementation of the Appropriations Act, and that there are other situations where they are adopting rules to comply with mandated Federal laws, and that the Department may not have much choice in these things.

Mr. Cater stated that the main thing in this bill is Sections 2 and 3, that Section 2 defines significant interest to the public. He noted that **REP. SIMON** has attempted to make it less burdensome for the agencies by giving agencies the discretion to determine whether or not it is a controversial issue, but indicated that, perhaps, every decision rendered by the Department of Public Health and Human Services is actually controversial, because it affects a person, usually reducing or increasing their benefits,

or changing a child support obligation, or the amount of child support they receive, and indicated that he would suggest that provision needs to be changed to make sure it is more than just a controversy between an individual, but rather a controversy among a class or groups of people. He stated that Section 3 is probably the most onerous provision of the bill because it sets forth the method by which State agencies are required to establish mailing lists, that it says "Each person submitting oral or written comments to, attending a hearing of, or contacting the agency for any purpose concerning agency actions and decisions must be advised of and given an opportunity to be placed on a list". He indicated that, at first blush, maybe it does not sound too onerous and, perhaps, for some small agencies, perhaps even the Attorney General's office, that would not be too much trouble because they do not deal with that many members of the public during any given day, but pointed out that not all agencies are alike, and that, within the Department of Public Health and Human Services, as indicated in his written testimony, there are tens of thousands of people that they provide benefits to, and tens of thousands of people that their offices deal with on a daily basis, and make contact with their offices. He said that the usually do not keep track of how many phone calls they get, but that they do within the Child Support Enforcement Division, and the administrator indicated that they get 20,000 calls a month for child support obligations. He pointed out that, whether a person is a recipient of child support or paying child support, this is very controversial and important to them, and he is sure they would want to be placed on any kind of list. He noted that it could be argued that, if it is only controversial to one person, all they have to do is provide the notice to that one person, but pointed out that this is not the way the bill reads, that, if someone says they want to be on the notice for all child support issues, that all child support issues are controversial, so they will have to notice all people who want to be on the mailing list, those 20,000 plus people, reiterating that this is just within the Child Support Enforcement Division. He reported that, prior to this hearing, he also spoke with the Chief Counsel for the State Fund, who indicated that, in their claims unit or information services unit, or something of that sort, they receive between 10,000 and 14,000 calls a month, and indicated they are talking about developing mailing lists that will have hundreds of thousands of people, which will definitely increase the cost. He noted that, if the Legislature is willing to pay for it, fine, but he does not see a fiscal note attached to this bill, nor any attempt in the Appropriations Committee to allow for publication or notices to be sent out. He added that he knows that **REP. SIMON** has questioned the fiscal note, and indicated that one of the larger expenses was submitted by the Department of Public Health and Human Services for $2.5 million a year, and that he is sure **REP. SIMON** firmly believes this is an outrageous amount, but pointed out that they have to keep in perspective that, right now, within the Department's Helena offices, alone, they spend $1.4 million

just for postage just to send out the notices they have now, and that asking for another $2.5 million a year is not unrealistic.

Mr. Cater stated that he believes, if they were centering this bill just on rules, he would not have a problem because they already keep a mailing list for rules, and that, when people ask to be put on the mailing list, they are put on a mailing list and are sent notice of rules, but pointed out that, to do it for every decision of the Department, is something else, that it astronomically increases the work load and the cost. He encouraged the Committee to consider the increases in time which would be imposed upon Department staff in doing this, but to come up with another method that they could figure out to give more notice, adding that he firmly believes that current law adequately protects the public, that perhaps what needs to be done is maybe a meeting of Legislators with the Governor to make sure that agencies are doing more to notify the public of important decisions. He indicated that he would not be opposed if the Legislature wanted to establish some kind of fund, but that he would say put it within the Secretary of State's office, or perhaps turn over the mailing list to the Legislative Auditor's office. He added that they do sincerely attempt to put people's names on the mailing list, but that perhaps there are occasions when an individual asks to be put on a mailing list, and it does not happen. He indicated that it is possible he could even be at fault at times, that, if he was asked to put someone on a mailing list as he leaves this room, he would be determined to put that person on that list but, between the time he left here and a half dozen other people contacted him on the way back to the office, he may have forgotten, that it would not be intentional, but is another reason to put some responsibility on the public, that they should put it in writing, or call his secretary rather than ask him in the hall somewhere away from his office.

Questions From Committee Members and Responses:

SEN. DELWYN GAGE referred to Section 8, and asked **REP. SIMON** if it is saying that, regardless of whether or not it is determined that attorneys fees will be paid, if you represent yourself, you get 90% of what the judge would determine a fair attorneys fee to be, or is it saying that, if the judge determines there will be attorneys fees, and you represent yourself, you get 90% of that.

REP. SIMON responded that the word "may" was used on line 27 so that the judge is not forced to provide attorneys fees, adding that if the judge feels that, for the most part, if was a frivolous law suit and maybe an individual prevailed on one small part, he would not have to grant attorneys fees, but if the judge felt that an individual had substantially prevailed and had been defending citizens' rights, that he would award attorneys fees. He then asked if someone would have to hire an attorney, or could they do it themselves, and reported that he filed a law suit against the Department of Commerce in December, without the

benefit of an attorney, in the Montana Supreme Court. He displayed a thick binder, and said that is what it took, that he did it without the use of an attorney, and asked if his time and the time of those people who helped him put it together not worth anything. He pointed out that, under current law, if he hired an attorney to do that and they prevailed, the court could say he is entitled to attorneys fees, and the attorney would get paid but, if he does it himself, he does not get a dime, noting that is a lot of work and a lot of effort went into it. He then indicated that he just put in another bill dealing with another issue and, displaying the file, asked if, in a law suit, is it not reasonable to assume that there should be some mechanism where a court could award fees to an individual. He pointed out that it does not specify "attorney" fees, that if a person does not use an attorney, he is entitled to receive remuneration up to 90% of what the judge would determine would be what an attorney would charge for that job.

SEN. GAGE noted that he understands that, but pointed out that it could be interpreted to mean that, if you represent yourself, you must be awarded 90% of what the judge would determine to be an attorneys fees.

REP. SIMON stated that is not his intention and, if they would like to clarify that, it is fine with him.

SEN. GAGE directed a question to a representative of the Department of Corrections. He pointed out that the fiscal note indicates that, by going from 6 to 12 point type in their advertisements, the cost of these ads would be doubled. Noting that he is not sure if that is true or not, he asked, assuming that it is, if the Department of Corrections is currently spending $622,500 on newspaper advertisements.

Mary Craigle, Research Manager, Department of Corrections, responded that she helped prepare the fiscal note, but that it was put together through a cumulative effort, and she was not the one who came up with that figure. She stated that she would assume it is correct, explaining that they post a number of notices, and they send out mailings continuously, especially in terms of parole hearings, etc., to people who are involved, noting that, with the newspaper articles, she is not exactly sure.

CHAIRMAN HARGROVE pointed out that the fiscal note indicates they can not tell how much effect it have on the County or local governments, but indicated that, according to the bill, cities, towns, municipalities and counties would all be required to do the same thing, and asked **REP. SIMON** if that is correct.

REP. SIMON answered yes.

{Tape: 2; Side: A; Approx. Time: 11:54 a.m.; Comments: End of Tape 2, Side A.}

CHAIRMAN HARGROVE indicated that **REP. SIMON** testified he has been receiving the *Montana Administrative Register* for a while, and asked if he uses it.

REP. SIMON replied yes, that he has, on more than one occasion, including when he was home for the break, that he got a call from an individual who was concerned about an upcoming hearing dealing with the Department of Public Health and Human Services regarding the child care facilities rule hearing. He indicated that he referred to the *Montana Administrative Register*, read the rules and referenced statute, that he gave a copy of each to the constitute, and he then appeared at the rules hearings and testified.

SEN. GAGE asked what the vote on this bill was in the House.

REP. SIMON replied that he could not remember, noting that it got a pretty good margin.

Closing by Sponsor:

REP. SIMON referred to Section 8, and indicated that the Committee may wish to clarify that it is not a requirement, noting that it was not his intent to make it a requirement. He indicated that, if a person takes on this responsibility on their own, rather than hiring an attorney, noting that the work he did would probably have cost him $40,000, if he had hired an attorney. He then reported that he was thrown out of the Montana Supreme Court because he lacked standing, that he brought forth some issues he thought involved the citizens' right to know, and due process of law, but the Supreme Court ruled that a Legislator does not have the authority to bring forth those issues. He added that, very likely, the Supreme Court will see that very same document with another person's name on it, that he knew there was risk and was not willing to risk $40,000 to hire an attorney but that, if he had been successful, it would have been nice to have been rewarded with getting some money back to help pay for the costs involved in preparing that themselves, that a lot of work went into it. He stated that, it seems to him, when somebody does that, they should be compensated for it.

He indicated that the issue of the emergency rules has come up, referring the Committee to page 10, and explained that departments are allowed to adopt emergency rules without public notice prior to the adoption of those rules. He pointed out that the Constitution sets out that the public has the right to participate in government decisions prior to the decisions being made but, in the case of emergency rules, the departments can override the Constitution. He indicated that this section is attempting to say that is an extraordinary power for agencies, and they should have a good reason for doing that, and that, once a rule has been adopted, that decision will be subject to immediate judicial review if a citizen requests that. He added that, as **Ms. Bartos** is aware, there is a law suit in Billings

right now over this issue, that the Department of Commerce adopted emergency rules, that the Department indicated there was imminent danger to public health, safety and welfare, and a need to adopt emergency rules, and that a citizen challenged the sufficiency of their reasons. He reported that the rules were adopted last May, that the hearing still has not been held, that they had a hearing on a Motion to Dismiss, but not on the judicial review, that they have not gotten that far, they are still going back and forth. He pointed out that emergency rules are good for 120 days, but now the judge is saying that the 120 days have gone by, that it is a moot question now because the time has already expired, and they have been adopted as standard rules. He added that there is nothing in statute requiring immediate judicial review, and asked when is this guy going to get a day in court. He then stated that, in the meantime, the City of Billings has acted, using the emergency rules, and made an application to the Department but that, by the time they get a decision, the court is liable to say "Well, the application was made under the emergency rules but, so much time has expired, it's too late to go back and change that decision, so we have to let that decision stand." He said that he does not think that is right, and this is what the bill is all about, to say it is subject to immediate judicial review, it is an emergency, that the Department declared the emergency and are the ones who said there is immediate danger to public health, safety and welfare, so, if it is, why should there not be an immediate review of the sufficiency of their reasons. He stated that he thinks it is very important that this be clarified, and recognized, and pointed out that it says because the exercise of the emergency rules precludes the people's Constitutional right to prior notice and participation in the operation of the government, it constitutes an extraordinary power, requiring extraordinary safeguards against abuse, stating that he thinks that is important because they are being granted an extraordinary power with the emergency rule provision.

REP. SIMON referred to **Mr. Cater's** statement that this should apply only to rules, and indicated that he disagrees. He stated that, certainly, rules are an important part of this, but, citing the example of an action by the Building Codes Bureau, reported that a lot of those actions, such as extending building codes jurisdiction in the cities, took place by printing a small notice in the newspaper which no one read, or understood, if they did, and the Bureau said no one was interested, so the jurisdiction was extended. He stated that they knew it was controversial, that there was a lot of citizen interest, if they had let the people know about it, but they did not want that to happen, so they just printed that little notice and, since no one understood it or, if they read it, it was buried in the legal section, which is why he is asking that the notices be printed on Sunday so that people who are looking for these types of notices would look in the Sunday paper, knowing that is the day these things would appear, and they would know about it. He added that it is more than that, that it is agency actions, pointing out that,

regarding the building codes issues, county residents were being given over to a city government to govern them and their buildings, and it was going to cost those residents potentially lots of money, that they wouldn't have to pay now, that it would affect their ability to build on their property, and who would supervise that, that the use of their property would all change, and certainly it was a matter of significant interest to those citizens. He indicated that, up until recently, the only notice was that small notice in the newspaper, one column, small type, and written in language difficult to understand. He reiterated that is what this bill is all about, to try to stop some of that, when they know that there is a controversial issue. He reported that there was a public hearing in Billings in October, 1985, that 500 people showed up because the citizens went out with leaflets door-to-door. He reported that they only needed 25 people to request a public hearing, but that 250 people requested the hearing, that they again handed out leaflets and, although it was a World Series night, 500 people took time out to come to the public hearing. He then stated that there was another request from the City of Billings for extended jurisdiction, a year later, and the Department did not acknowledge that it was a matter of significant public interest and schedule a public hearing, although they knew about the significance of the public's interest, that they indicated, if there is sufficient public interest by 25 citizens who write in and request a hearing, and that 25 citizens had to write in and request the public hearing. He added that it should have been automatic, that they knew this was controversial, and that there was a lot of significant public interest, and they should have acknowledged that. He reiterated that this is what this bill does, that it tells them when it is a matter of significant public interest. He noted that it is not his intention to affect every little action of the departments and, if the Committee could come up with some amendments to narrow the scope of this, he would be agreeable, but pointed out that, when they are taking significant action which affects a class of citizens, beyond just a single individual, then there should be some public notice so that the people know what is going on and can participate in the decision, participate in their government, that it is their government, it is not our government and it is not their government, it is all of our government, all of the citizens' government, and they should have the right to participate. He said that he appreciates the time the Committee has taken and would urge a do concur recommendation.

ADJOURNMENT

Adjournment: 12:06 p.m.

SEN. DON HARGROVE, Chairman

MARY MORRIS, Secretary

Transcribed by JUDY KEINTZ

DH/MM