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4. Mid Century Insurance Company
5. Greenwich Insurance Company
6. American Economy Insurance Company
7. American States Insurance Company
8. American States Preferred
9. General Insurance Company
10. First National Insurance Company
11. Farmers Insurance Exchange
12. American Guarantee & Liability Insurance Company
13. American Zurich Insurance Company
14. Assurance Company of America
15. Colonial American Casualty and Surety Company
16. Fidelity and Deposit Company of Maryland
17. Maryland Casualty Company
18. Northern Insurance Company of New York
19. Valiant Insurance Company
20. Zurich American Insurance Company
21. Zurich American Insurance Company of Illinois
22. Clarendon National Insurance Company
23. Centre Insurance Company
24. XL Insurance America, Inc.
25. XL Insurance Company of New York
26. XL Reinsurance America
27. XL Specialty Insurance Company
28. Markel Insurance Company
29. Safeco Insurance Company of America
30. Safeco Insurance Company of America
31. Safeco Insurance Company of Illinois
32. Everest National Insurance Company
33. Fairfield Insurance Company

FILED

JUN 21 2005

OFFICE OF
WORKERS' COMPENSATION JUDGE
HELENA, MONTANA

DOCKET ITEM NO. 276

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

ROBERT FLYNN and CARL MILLER,
Individually and on Behalf of Others
Similarly Situated,

Petitioners,

vs.

MONTANA STATE FUND,

Respondent/Insurer,

and

LIBERTY NORTHWEST INSURANCE
CORPORATION,

Intervenor.

WCC No. 2000-0222

RESPONSE TO SUMMONS

COMES NOW Respondents, American Alternative Insurance Corp.; American Reinsurance Company; Truck Insurance Exchange; Mid Century Insurance Company; Greenwich Insurance Company; American Economy Insurance Company; American States Insurance Company; American States Preferred; General Insurance Company; First National Insurance Company; Farmers Insurance Exchange; American Guarantee & Liability Insurance Company; American Zurich Insurance Company; Assurance Company of America; Colonial American Casualty and Surety Company; Fidelity and Deposit Company of Maryland; Maryland Casualty Company; Northern Insurance Company of New York; Valiant Insurance Company; Zurich American Insurance Company; Zurich American Insurance Company of Illinois; Clarendon National Insurance Company; Centre Insurance Company; XL Insurance America, Inc.; XL Insurance Company of New York; XL Reinsurance America; XL Specialty Insurance Company; Markel Insurance Company; Safeco Insurance Company of America; Safeco Insurance Company of American; Safeco Insurance Company of Illinois; Everest National Insurance Company; and Fairfield Insurance Company ("Respondents"), and in response to this Court's *Summons*, dated May 4, 2005, states as follows:

**RESPONDENTS DISPUTE THE ENTITLEMENT OF FLYNN BENEFICIARIES TO
ADDITIONAL BENEFITS**

Respondents dispute the entitlement of claimants insured by them to additional benefits under the *Flynn* decision. The grounds upon which Respondents dispute said entitlements are as follows:

1. Certain claimants' entitlement to *Flynn* benefits are precluded by the passage of time and the applicability of the doctrines of waiver, estoppel, laches, and/or various statutes of limitations.
2. An order requiring Respondents to identify all *Flynn* beneficiaries creates an unreasonable and undue burden upon Respondents.
3. An order requiring Respondents to pay *Flynn* benefits and/or to pay or withhold the attorney lien in favor of Rex Palmer is prohibited by the due process clause of the Montana Constitution, Article II, Section 17. Respondents were not parties to and did not have an opportunity to be heard on the merits of the *Flynn* or *Miller* cases.
4. An order requiring Respondents to pay *Flynn* benefits and/or to pay or withhold the attorney lien in favor of Rex Palmer is prohibited by the due process clause of the 14th Amendment to the United States Constitution. Respondent were not parties to and did not have an opportunity to be heard on the merits of the *Flynn* or *Miller* cases.
5. No common fund may be maintained against Respondents in this case because the purported non-participating beneficiaries of the *Flynn* decision are not ascertainable for several reasons, including but not limited to: (a) Montana statutes and regulations do not require the indefinite retention of claim files; and (b) Montana statutes and regulations do not presently and have not previously required that claimants report to the workers' compensation insurer paying benefits the amount of attorney fees paid by claimants to obtain SSDI benefits.
6. Petitioner's common fund attorney's lien does not and cannot extend to "all Montana workers' compensation claimants who incurred costs or fees to obtain a social security award for which the entity providing workers' compensation coverage took an offset or had a policy of taking an offset without accounting for the costs incurred by the claimant to recover the award" from July 1, 1974 through August 3, 2003. Petitioner's purported attorney lien notice is overbroad because workers' compensation claimants whose claims were released or closed are not entitled to additional benefits. Moreover, to the extent that closed claim files have not been retained, such claimants are unascertainable.
7. Even if a common fund were created through the efforts of Petitioners, neither Petitioners nor their attorney are entitled to a fixed percentage of additional benefits that may be awarded to non-participating beneficiaries with whom neither Petitioners nor their attorney have any relation. Under the common fund doctrine, non-participating beneficiaries should contribute, in proportion

to the benefits actually received by them, only to the litigation costs incurred by Petitioners in the *Flynn* and *Miller* litigation, including reasonable attorney fees. The maximum amount of costs and attorneys' fees recoverable by the participating litigants and/or their attorney is limited to those costs and fees actually incurred in creating the benefit for the non-participating beneficiaries.

8. Respondents request and reserve the right to assert additional grounds and defenses, or to adopt the grounds presented by others responding to the summons as circumstances apply and warrant.

WHEREFORE, Respondents respectfully request this Court to enter an order denying the entitlement to *Flynn*-type benefits by any potential claimants insured by Respondents.

Dated this 20th day of June, 2005.

CROWLEY, HAUGHEY, HANSON,
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Company; Truck Insurance Exchange;
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Company; American States Preferred;
General Insurance Company; First
National Insurance Company; Farmers
Insurance Exchange; American
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Company; American Zurich Insurance
Company; Assurance Company of
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and Surety Company; Fidelity and
Deposit Company of Maryland;
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Valiant Insurance Company; Zurich
American Insurance Company; Zurich
American Insurance Company of Illinois;
Clarendon National Insurance
Company; Centre Insurance Company;
XL Insurance America, Inc.; XL
Insurance Company of New York; XL
Reinsurance America; XL Specialty
Insurance Company; Markel Insurance
Company; Safeco Insurance Company
of America; Safeco Insurance Company
of American; Safeco Insurance
Company of Illinois; Everest National
Insurance Company; Fairfield Insurance
Company

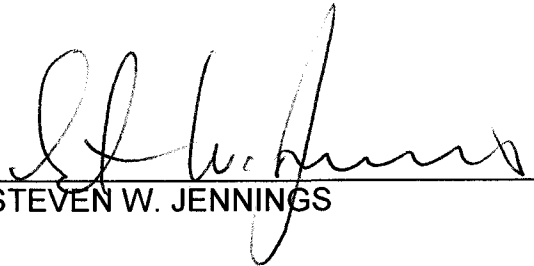
By: 

STEVEN W. JENNINGS

CERTIFICATE OF SERVICE

I, STEVEN W. JENNINGS, one of the attorneys for the law firm of Crowley, Haughey, Hanson, Toole & Dietrich P.L.L.P., hereby certify that on the 20th day of June, 2005, I mailed a true and correct copy of the foregoing document, postage prepaid, to the following:

Mr. Rex Palmer
Attorneys Inc., PC
301 W. Spruce
Missoula, MT 59802



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Attorneys are licensed in Montana unless otherwise noted; * also licensed in North Dakota; # also licensed in Wyoming; + not licensed in Montana

June 20, 2005

Workers' Compensation Court
PO Box 537
Helena, MT 59624-0537

VIA FAX & U.S. MAIL

RE: *Robert Flynn and Carl Miller vs. Montana State Fund, et al.*
WCC No. 2000-0222
Catherine E. Satterlee, et al. vs. Lumberman's Mutual Casualty Company, et al.
WCC No. 2003-0840
Dale Reesor vs. Montana State Fund
WCC No. 2002-0676

Dear Clerk:

On behalf of our client insurance companies, enclosed please find the following documents for filing in the above-referenced matters:

- 1) Answer to Summons and Notice of Attorney Fee Lien;
- 2) Responses to Summons;
- 3) Notice of Intent to Intervene;
- 4) Notice of Appearance; and,
- 5) Motions to Dismiss and Supporting Brief.

Workers' Compensation Court

RE: *Robert Flynn and Carl Miller vs. Montana State Fund, et al.*
Catherine E. Satterlee, et al. vs. Lumberman's Mutual Casualty Company, et al.
Dale Reesor vs. Montana State Fund

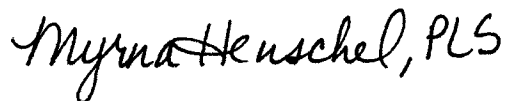
June 20, 2005

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Thank you in advance for your assistance with this matter.

Sincerely yours,

CROWLEY, HAUGHEY, HANSON,
TOOLE & DIETRICH P.L.L.P.

A handwritten signature in cursive script that reads "Myrna Henschel, PLS".

Myrna Henschel, Certified PLS
Legal Secretary to Steven W. Jennings

mlh
Enclosures