MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON HIGHWAYS AND TRANSPORTATION

Call to Order: By Chairman Stang, on February 2, 1989, at 3:00 p.m.

ROLL CALL

Members Present: All with exception of:

Members Excused: Rep. Davis, Rep. Harrington and Rep. O'Connell

Members Absent: None

Staff Present: Paul Verdon, Researcher
Claudia Johnson, secretary

Announcements/Discussion: None

HEARING ON HB 363

Presentation and Opening Statement by Sponsor:

Rep. Lee, House District 49, opened by reading a letter from Janet L. Read, Bigfork, stating the issue of this legislation is the co-ownership of road easements and the responsibility for co-owners to share equitably in the maintenance of private roads. See Exhibits 1 & 2. Rep. Lee stated there might be a question in the bill on snowplowing being under repairs and maybe an amendment could be added on the make the language more clear.

Testifying Proponents and Who They Represent:

None

Proponent Testimony:

None

Testifying Opponents and Who They Represent:

Tom Hopgood, Mt. Assoc of Realtors

Opponent Testimony:

Mr. Hopgood stated he opposes the bill because if one person that uses the private easement and maintains and repairs that road and then charge neighbors after a unilateral agreement could invite a court battle. Mr. Hopgood commented on Rep.

Lee's statement about "repair", does repair mean to snowplow or just grading the road or can someone that lives on the end of the road state they are going to have the road paved and have a $50,000 or $60,000 project and someone that lives closer in will have to pay their share of the cost.

Questions From Committee Members: Rep. Bachini asked Rep. Lee how the charge for road repair would be distributed. Rep. Lee stated he felt they may be getting into legal technicalities and he couldn't answer.

Rep. Roth asked Mr. Hopgood if this bill were passed and a number of people on the road wanted it paved and one person didn't, could he be charged for it. Mr. Hopgood stated that could happen and also the same in reverse and felt this bill would be a reason to litigate.

Closing by Sponsor: Rep. Lee closed admitting there are some technical difficulties in this bill especially when establishing something new in the state and that is why he included a package with it stating citations and case laws from other states. Rep. Lee did feel that they could come to some satisfactory agreement and make the language cleaner in the bill.

HEARING ON HB 467

Presentation and Opening Statement by Sponsor:

Rep. Brooks, House District 56, stated she was asked by the Office of Public Instruction to carry this bill. Rep. Brook stated this bill provides certain qualifications for school bus drivers. Rep. Brooks stated other proponents would be able to explain these qualifications. Rep. Brooks read a statement from Claudette Morton from Board of Public Education. See Exhibit 3.

Testifying Proponents and Who They Represent:

Terry Brown, Transportation Inspector of OPI

Proponent Testimony:

Mr. Brown said with the law going into effect in the state of Montana on the commercial licensing, a school bus driver that applies for certification in the state of Montana has to meet 3 criteria: 1) Must have a physical examination; 2) First aid training; and 3) what used to be a chauffeur license, is now a commercial license. Mr. Brown stated that now if a school bus driver who wants to cross the state line they must have a type 1 certificate/license, and that means they have to pass a DOT/Dept. of Transportation approved physical rather than the OPI test that has been used for years. Mr. Brown hoped that some day a uniform physical could be adopted that would cover all situations as far as

physical are concerned. Mr. Brown addressed the first aid requirement stating that Red Cross has changed their courses or their name. Mr. Brown stated that OPI has adopted rules that state they can use other programs other than Red Cross. He stated by changing the word "standard" to "basic" Mr. Brown felt that would cover all areas. Mr. Brown stated that bus driving is a part time job, and they have problems finding qualified drivers that have a qualified Red Cross certificate and felt a basic first aid course would be sufficient. First aid courses that are accepted in the office are: a) a military medical corpsman training b) valid advanced first aid certificate, c) a certificate of emergency training, d) registered nurse training course, e) Bureau of Mines safety course, f) bus driver training program approved by OPI, and, g) medic first aid.

Tony Campeau, Board of Public Education, Mr. Campeau stated the BPE has a responsibility of setting the requirements not in law for school bus drivers. Mr. Campeau stated they do work with OPI and the federal government to keep the requirements up to date. Mr. Campeau said that HB 467 is bringing the requirements into conformance with legal appropriate practice and urged the Committees support.

Testifying Opponents and Who They Represent:

None

Opponent Testimony:

None

Questions From Committee Members: Rep. Roth asked Mr. Brown what form they used before the DOT form? Mr. Brown stated it was a TEI form which is similar to the DOT and the only difference is that the DOT will not allow a driver that is a diabetic on insulin to drive and the TEI will.

Rep. Patterson asked Mr. Brown what was going to be done this coming year regarding the change in the license? Mr. Brown replied that they have sent out letters showing the change in the commercial license law and the two types of physical that they would have to have for the different types of classification. Mr. Brown stated that form is available through the American Trucking Assoc. or from the Montana Trucking Assoc and also the doctor's office. Mr. Brown stated that OPI has the P9 form for physical that is available for all school districts and contractors.

Rep. Clark asked Mr. Brown how many people would be affected by this change in the class A type certificate. Mr. Brown replied that those type of school bus operations are contractors that also operate over the road coaches as far as PSC regulations go and would be greatly affected and

those schools that are on the state lines.

Closing by Sponsor: Rep. Brooks urged the Committee's favorable recognition of this bill for the safety of the children in our state that have to travel by bus.

EXECUTIVE ACTION:

DISPOSITION OF HOUSE BILL 56

Motion: None

Discussion: Rep. Steppler stated he has worked with the Dept. of Highways and the Dept. of Commerce along with Rep. Whalen. Rep. Steppler said the Dept. of Highways has agreed to fund the signs with the following restrictions: 1) The Dept. of Highways will re-do the signs on the interstate within the next biennium and the sign at Alzada, and 2) The primary highways will be done when the signs that are up now deteriorate, and are vandalized, etc.. Rep. Steppler stated this project and costs would take place over the next ten years.

Rep. Stang asked Rep. Whalen if the signs are going to be an appropriation from the Highway Committee, then you should strike everything after the enacting clause, stating the dept. is appropriating the money. Rep. Whalen replied that it had to be specific legislation requiring the signs.

Amendments, Discussion, and Votes: Rep. Steppler made the motion to strike everything after the enacting clause and have Paul Verdon revise it the way it should be. Rep. Westlake called the question. The motion CARRIED to DO PASS. Rep. Campbell voted no.

Recommendation and Vote: None

DISPOSITION OF HOUSE BILL 165

Motion: None

Discussion: Paul Verdon, researcher, explained the gray bill's provisions for dispositions of funds. The first gray bill deposits the money directly in a account to be established in the bill and then to allow legislature to appropriate the money for specific purposes each session. Gray Bill #2 creates the same kind of an account but in a separate section statutorily appropriates the money received from the decals to the Dept. of Fish, Wildlife and Parks. Mr. Verdon stated it is up to the Members of the Committee which process they want to use and which is the most effective. Mr. Verdon stated if the money goes into the fund suggested in the first gray bill, the money will be subject to appropriation by legislature. With the statutory

appropriations provided in Gray Bill #2 the money it will be used automatically as provided in HB 165.

Rep. Stang stated the first gray bill means the money goes into the fund and if Legislature wishes they could take that money and use it in the general fund, etc., and under the second gray bill, the money is used only for special purposes.

Amendments, Discussion, and Votes: Rep. Clark made the motion to move Gray Bill #1.

Mr. Verdon stated under this gray bill the fees are deposited in an account in a special revenue fund to be used for this purpose, but the money has to be appropriated by Legislature every two years.

Rep. Campbell called the question. The motion CARRIED to DO PASS AS AMENDED 11/2. Rep. Westlake and Rep. Stang voted no.

Rep. Patterson made the motion to amend Gray Bill #1 to require a 50 cent fee for the Noxious Weed Trust program for non-licensed off-road vehicles.

Rep. Roth called the question. The motion CARRIED to DO PASS. Rep. Campbell voted no.

Rep. Bachini made the motion to have Paul Verdon draft the amendment to insert the 50 cent weed fee to Gray Bill #1.

Rep. Roth call the question. The motion CARRIED to DO PASS.

Recommendation and Vote: The motion CARRIED to DO PASS AS AMENDED.

There being no further business the Committee was adjourned.

ADJOURNMENT

Adjournment At: 4:40 p.m.

REP. Barry Stang, Chairman

BS/cj

2806.min

DAILY ROLL CALL

HIGHWAYS AND TRANSPORTATION COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date February 2, 1989

NAME	PRESENT	ABSENT	EXCUSED
Chairman Stang, Barry "Spook"	✓		
Vice Chairman Linda Nelson	✓		
Rep. Bachini, Bob	✓		
Rep. Davis, Ervin			✓
Rep. Harrington, Dan			✓
Rep. O'Connell, Helen			✓
Rep. Steppler, Don	✓		
Rep. Westlake, Vernon	✓		
Rep. Aafedt, Ole	✓		
Rep. Campbell, Bud	✓		
Rep. Clark, Robert	✓		
Rep. Owens, Lum	✓		
Rep. Patterson, John	✓		
Rep. Roth, Rande	✓		
Rep. Zook, Tom	✓		

EXHIBIT 1
DATE Feb 2, 1989
HB 363

January 23, 1989

Tom Lee
Reperesentative
P.O. Box 84
Capitol Station
Helena, MT

Committee to Adopt Legislation

I am writing this letter in lieu of attending the committee hearing as I am unable due to job obligations to get to Helena for a personal appearance.

The issue in this legislation is the co-ownership of road easements and the responsibility for co-owners to share equitably in the maintenance of private roads.

The first consideration here is that all the available attempts have been made through the commissioners in Lake County where I reside to have this road taken over by the County under a Special Improvement District. Lake County is already overburdened with road maintenance and is unable to take this or any other roads over at this time. Therefore, the only alternative is to have this road maintained by the residents on the road. This road was also dedicated to this subdivision before the subdivision laws were put into effect in the early 1980's and there are no covenants to enforce maintenance of the road by homeowners. It is my understanding that this situation exists on many many private roads not only in Lake County but all over the state.

A vigilant attempt was made four years ago to organize the local homeowners on the road and form a legal road association with by laws that would obligate residents to participate in basic maintenance such as snow plowing in winter and grading in the summer. Several meetings were held at my home and the feeling among those that did attend (there are eighteen full-time residents on this road, ten attended the meetings) that unless everyone joined the association and participated financially that they were no longer going to shoulder the burden of snow plowing in the winter. Though it was discussed that this created a fire hazard in the case of the need for assistance from the Fire Department and a problem for a medical emergency since the QRU did not have a four-wheel drive at the time, the general concensus was that those who had been shouldering the burden to this point were fed up with carrying others and that they would

tough it out.

As a point of reference the annual fee necessary to keep this two miles of road plowed in the winter was suggested at $25 a year, or approximately $2 a month. Those that have consistently refused to pay said that they couldn't afford that and besides there was no law requiring them to participate. This was hard for the rest to swallow because my neighbor who is a paraplegic and who lives on disability income solely has always paid towards the maintenance of the road in the past and he has the smallest income but realizes the importance of having the road plowed. It was inconceivable to the residents who have shouldered the burden that $2 a month was beyond anyone's means, considering the alternative of a fire or a medical emergency.

As a token of good faith that winter I paid personally for the first plowing of $70 to help implement the process, and to this date only two other residents have reimbursed me at $7 each. The others still maintain that unless everyone pitches in they will not. Needless to say, last winter the road was never plowed once, as I also adopted the attitude that I certainly couldn't afford to plow everyone out six or seven times a winter and not be reimbursed. I put my chains on when necessary and everyone relied on their four-wheel drives to get them in and out.

I have had extensive conversations with the local Fire Departments and the QRU and they are very much in support of something to help get these roads at least plowed in the winter. Our road is only a small sampling of the problems they have because there are so many private roads in Lake and Flathead Counties.

I am certainly not an advocate of excessive government intervention in people's lives. I cherish my own personal freedoms and rights, particularly in regard to my personal and real property. But a private road that is shared in common and used by several residents is private only in the sense that the County has not included it in their tax base for road maintenance. I certainly respect an individual's right to maintain his own personal property in any fashion that he choses and hope that that freedom is never denied any of us. But when property is shared in common, which a road is real property with an easement granted for use, then the burden to keep that road in repair and to make access to property possible should be distributed equitably among those who use the road or their easement over it proportionate to their relative use. The same applies to a well shared by more than one party. It's maintenance and upkeep should be equitably shared by the common owners who derive benefit from its use.

I don't think that placing the responsibility for maintenance of a private road shared in common in any way

violates anyone's constitutional or personal rights. One who uses anything in conjuntion with others for his own personal benefit has no right to burden others with its repair or maintenance simply because he does not feel like sharing in this responsibility. That is a violation of others personal rights. The right to use a private road as granted by easement is the same as the right to use the public roads, and that right carries with it the burden of paying property taxes, either through ownership of property or the renting of property. If people don't make some contribution to the services that they use and expect, those services couldn't exist.

It is my understanding that this society of ours, at least in Montana, as a member of the United States of America, is to be determined by and the responsibility of the people of this democracy. This is not a police state, a socialist state, communist state or welfare state as determined by our Constitutuion. Therefore, those who enjoy the benefits of this society must financially share in the benefits thereof, as they participate in the governing thereof through their right to vote. This is a privilege not available in more restrictive societies, but is also a responsibility. And the more that responsibility is equitably shared and owned the smoother the social structure.

Beyond the ideology of equitably responsibility there is a real and present danger for those of us who do take the responsibility of carrying fire insurance. As what good is a fire insurance policy when it was determined that there was no possible access to the site of the fire. And those who have mortgages, as most people do, mandatorily must carry this insurance, and shouldn't be forced to pay outrageous rates because a few of their neighbors are unwilling to accept their responsibilty to use of a shared road at a cost of $2 a month. This legislation will not unduly burden the people of this state but simply help maintain equity.

As a legal secretary for two firms in Kalispell it was pointed out to me by the head of both firms that having this legislation within the Montana Code Annotated would aid in the decision of a Small Claims Court Justice of the Peace, should it be necessary for members of a private road to enforce equitable payment of road maintenance by those who have chosen to use the road without accepting responsibility.

The case law that has been given to Tom Lee as precedence in this matter shows that this is not only a problem in this state, in this area and on my road, it has been a problem elsewhere and the decision has been that a private road shared in common demands the equitable sharing of financial responsibility for repair proportionate to use. See:

25 American Jurisprudence 2.d §85;

28 Corpus Juris Secundum § 94;
(Iowa) Bina v. Bina 78 ALR 216;
(California) Zimmerman v. Young, 169 P.2d 37;
(Hawaii) Levy v. Kimball, 443 P.2d 142;
(Arizona) Pap v. Flake, 503 P.2d 972;
(Idaho) Gibbens v. Weisshaupt, 570 P.2d 870;
(Kansas) Struass v. Thompson, 259 P.2d 145,
(New Mexico) Kennedy v. Bond, 460 P.2d 809; and
(Colorado) Barnard v. Gaumer, 361 P.2d 778.

In all of the above cited cases it was decided that the burden to maintain an easement fell on the owner of the easement and those who used the easement, particularly where both dominant tenant and servient tenant enjoyed the use of a road in common.

It is time that Montana had some vehicle to aid in the maintenance and upkeep of all of the private roads in the state that the local government are unable to maintain. This will insure the health and safety of all who enjoy the benefits and use of these roads.

I appreciate your consideration of this matter and hope that you can visualize yourself living on a road that was not maintained by local government and not wanting to shoulder the burden for reasonable repair and maintenance, particularly in the winter when access alone is a consideration, and have empathy for those of us who have struggled to find an equitable solution to this problem. This legislation will provide an equitable solution.

Sincerely,

Janet L. Read

The reasonableness of the improvements or repairs made by the owner of an easement of way is largely a question of fact,[8] and depends on the extent and character of the lawful use of the easement.[9]

It has been held that in preparing an easement of way for proper use the easement owner may grade,[10] gravel, plough, or pave such way.[11] There is also authority that the owner of an easement of way may improve it by constructing a sidewalk,[12] or by replacing a cinder driveway with a concrete one.[13]

Where there are several owners in common of an easement, such as a private way, each owner may make reasonable repairs which do not injuriously affect his co-owners.[14] Furthermore, where a private road is used in common by the owner of land across which such road runs and by a person who has an easement of way over it, the burden of reasonable repairs must be distributed between them in proportion as nearly as possible to their relative use of the road.[15]

§ 86. Right of access to make repairs or improvements; secondary easements.

In order that the owner of an easement may perform the duty of keeping it in repair,[16] he has the right to enter the servient estate at all reasonable times to effect the necessary repairs and maintenance,[17] or even to make original constructions necessary for enjoyment of the easement.[18] Such right is

of way to make repairs exists without question where the way is impassable and useless without repairs. Guillet v Livernois, 297 Mass 337, 8 NE2d 921, 112 ALR 1300; Bors v McGowan, 159 Neb 790, 68 NW2d 596.

8. Doan v Allgood, 310 Ill 381, 141 NE 779; Hultzen v Witham, 146 Me 116, 78 A2d 342; Guillet v Livernois, 297 Mass 337, 8 NE 2d 921, 112 ALR 1300.

9. Doan v Allgood, 310 Ill 381, 141 NE 779.

10. Holt v Wissinger, 145 Conn 106, 139 A2d 353; Bellevue v Daly, 14 Idaho 545, 94 P 1036; Guillet v Livernois, 297 Mass 337, 8 NE2d 921, 112 ALR 1300; Moore v White, 159 Mich 460, 124 NW 62; Thompson v Williams (Tex Civ App) 249 SW2d 238, affd 152 Tex 270, 256 SW2d 399; Oney v West Buena Vista Land Co. 104 Va 580, 52 SE 343.

A way may be regraded without consent of servient owner. Hughes v Boyer, 5 Wash 2d 81, 104 P2d 760.

The owner of an easement of way may depress the grade of the way so as to make it accessible to a public highway with which it connects. Mercurio v Hall, 81 Ind App 554, 144 NE 248; Bors v McGowan, 159 Neb 790, 68 NW2d 596.

11. Bors v McGowan, supra; Herman v Roberts, 119 NY 37, 23 NE 442; Thompson v Williams (Tex Civ App) 249 SW2d 238, affd 152 Tex 270, 256 SW2d 399.

Annotation: 112 ALR 1308.

12. Guillet v Livernois, 297 Mass 337, 8 NE2d 921, 112 ALR 1300.

13. Knuth v Vogels, 265 Wis 341, 61 NW2d 301.

14. Schuricht v Hammen, 221 Mo App 389, 277 SW 944; Mehene v Ball, 22 Misc 2d 577, 194 NYS2d 28; Cain v Aspinwall-Delafield Co 289 Pa 535, 137 A 610; Stifel v Hannan, 95 W Va 617, 123 SE 573.

15. Bina v Bina, 213 Iowa 432, 239 NW 68, 78 ALR 1216.

16. § 85, supra.

17. Lamb v Dade County (Fla App) 159 So 2d 477; Central Kentucky Natural Gas Co. v Huls (Ky) 241 SW2d 986, 28 ALR2d 621; Tong v Feldman, 152 Md 398, 136 A 822, 51 ALR 1291; Prescott v Williams, 46 Mass (5 Met) 429; Dyer v Compere, 41 NM 716, 73 P2d 1356; Otter Tail Power Co. v Malme (ND) 92 NW2d 514.

Annotation: 169 ALR 1148 (water easements); 28 ALR2d 630, § 4 (pipeline easements).

A person having an easement in a ditch running through the land of another may go on the servient land and use so much thereof as may be required to make all necessary repairs and to clean out the ditch at all reasonable times. Carson v Gentner, 33 Or 512, 52 P 506; Holm v Davis, 41 Utah 200, 125 P 403.

The owner of the servient estate, over whose land an easement exists in a watercourse in favor of the owner of the dominant estate, must permit the cleaning out of the watercourse across his land. Nixon v Welch, 238 Iowa 34, 24 NW2d 476, 169 ALR 1141.

18. United States v 3.08 Acres of Land

For later cases see same Topic and Key Number in Pocket Part

purported to give the users "a perpetual and exclusive easement for roadway purposes," so as to permit the owner of the land to use the easement in common with those to whom the easement was given.

George v. Coombes, 562 P.2d 200, 278 Or. 3.

Wash.App. 1978. In action involving easement, there was substantial evidence in record to support court's finding that parties to easement intended a joint use of easement.

Broadacres, Inc. v. Nelsen, 583 P.2d 651, 21 Wash.App. 11.

Fact that servient owner permitted dominant owners to use easement exclusively during certain hours did not mean that she abandoned her own right to use easement.

Broadacres, Inc. v. Nelsen, 583 P.2d 651, 21 Wash.App. 11.

Where original parties to easement intended joint use thereof, dominant owners could not prevail in action against servient owner simply by proving that servient owner's intended use would "inconvenience" them.

Broadacres, Inc. v. Nelsen, 583 P.2d 651, 21 Wash.App. 11.

⇐53. Maintenance and repair.

Library references

C.J.S. Easements § 94.

Ariz. 1963. A landowner who is grantor of an easement is not required to maintain easement.

Gillespie Land & Irr. Co. v. Gonzalez, 379 P.2d 135, 93 Ariz. 152.

Ariz.App. 1972. A dominant owner, using due care not to needlessly increase burden of a servient tenement, has right to enter upon the servient tenement for purposes of upkeep and repairs of the easement and easement carries with it the right to do all acts necessary and proper in order to obtain full enjoyment of the easement.

Papa v. Flake, 503 P.2d 972, 18 Ariz.App. 496.

Owner of an easement has right to enter servient estate at all reasonable times to effect necessary repairs and maintenance.

Papa v. Flake, 503 P.2d 972, 18 Ariz.App. 496.

Colo.App. 1973. If owner of dominant estate does not unnecessarily inconvenience owner of servient estate and use of easement is not expanded, owner of the dominant estate may do whatever is reasonably necessary for the enjoyment of the easement, including repairs, ingress and egress, with space therefor as exigency may show.

Shrull v. Rapasardi, 517 P.2d 860, 33 Colo. App. 148.

Colo.App. 1973. Acquiescence of grantor of roadway easement in the construction by grantee of dirt-covered culvert at stream crossing on roadway and repairs and replacement to existing wooden bridge located at stream crossing on roadway evidenced grantor's intent that grantees be able to take reasonable steps to maximize the utility of the right-of-way easement across grantor's property.

Dahl v. Rettig, 506 P.2d 1251, 32 Colo. App. 87.

Grantees of roadway easement had right to replace destroyed bridge which had been located at stream crossing on roadway; replacement was a necessary repair arising out of grantees' use of easement and was reasonable.

Dahl v. Rettig, 506 P.2d 1251, 32 Colo. App. 87.

Hawaii 1968. Owner of easement has right and duty to keep it in repair, and is liable in damages for injuries caused by failure to keep the easement in repair.

Levy v. Kimball, 443 P.2d 142, 50 Haw. 497, 637, appeal after remand 465 P.2d 580, 51 Haw. 540.

Control over easement and not ownership of the property determines who is liable for injuries resulting from failure to maintain and repair the easement.

Levy v. Kimball, 443 P.2d 142, 50 Haw. 497, 637, appeal after remand 465 P.2d 580, 51 Haw. 540.

Idaho 1977. Where gates used for controlling livestock were constructed and used across easement from time fence was constructed in early 1940's, construction and maintenance of such gates was reasonable condition to impose upon use of prescriptive easement, provided that any gates constructed on easement be easy to open and of sufficient width.

Gibbens v. Weisshaupt, 570 P.2d 870, 98 Idaho 633.

Owner of easement has right and duty to maintain, repair, and protect easement, which duty requires easement owner to maintain easement so as not to create additional burden on servient estate.

Gibbens v. Weisshaupt, 570 P.2d 870, 98 Idaho 633.

Owner of servient estate has no duty to maintain easement.

Gibbens v. Weisshaupt, 570 P.2d 870, 98 Idaho 633.

Owner of dominant estate would be required to absorb cost of constructing and maintaining any gates necessary to protect prescriptive easement over access roadway across servient tenement and to allow servient tenants reasonable use of their land as pasturage.

Gibbens v. Weisshaupt, 570 P.2d 870, 98 Idaho 633.

EXHIBIT 2
2-02-89
HD

For later cases see same Topic and Key Number in Pocket Part

Colo. Absent any agreement on question of maintenance of private way for which easement had been granted, burden of upkeep should be distributed between dominant and servient tenements in proportion to relative use of road, as nearly as such may be ascertained.—Barnard v. Gaumer, 361 P.2d 778, 146 Colo. 409.

Colo.App. 1973. Acquiescence of grantor of roadway easement in the construction by grantee of dirt-covered culvert at stream crossing on roadway and repairs and replacement to existing wooden bridge located at stream crossing on roadway evidenced grantor's intent that grantees be able to take reasonable steps to maximize the utility of the right-of-way easement across grantor's property.—Dahl v. Rettig, 506 P.2d 1251.

Grantees of roadway easement had right to replace destroyed bridge which had been located at stream crossing on roadway; replacement was a necessary repair arising out of grantees' use of easement and was reasonable. —Id.

Hawaii 1968. Owner of easement has right and duty to keep it in repair, and is liable in damages for injuries caused by failure to keep the easement in repair.—Levy v. Kimball, 443 P.2d 142, 50 Haw. 497, 637, appeal after remand 465 P.2d 580, 51 Haw. 340.

Control over easement and not ownership of the property determines who is liable for injuries resulting from failure to maintain and repair the easement.—Id.

Idaho. One acquiring an easement and right to travel over the lands of another not only assumes burden of maintaining the right of way but all other burdens incident to the use. —Kirk v. Schultz, 119 P.2d 266, 63 Idaho 278.

Generally, an owner of land subject to an easement of a nature which requires the maintenance of a means for its enjoyment is not bound to keep such means in repair or to sustain any expense in maintaining it.—Id.

Kan. In absence of agreement to contrary, duty to maintain easement rests on person claiming it.—Strauss v. Thompson, 259 P.2d 145, 175 Kan. 98.

Mont. The right to enter upon servient tenement for purpose of repairing or renewing artificial structure, constituting an easement, is called a "secondary easement", which is a mere incident of the easement that passes by express or implied grant or is acquired by prescription.—Laden v. Atkeson, 116 P.2d 881, 112 Mont. 302.

The owner of dominant estate having easement, has right to enter on servient estate and make repairs necessary for reasonable and convenient use of easement, doing no unnecessary injury to servient estate.—Id.

An easement for travel across servient tenement is a "property right" belonging exclusively to dominant owners, who are responsible for the necessary upkeep of the way in so far as dominant owners' use of way is concerned.—Id.

Nev. 1964. Where easement is used and enjoyed for benefit of dominant estate alone, owner of servient estate is under no obligation to make repairs, and he who uses easement must keep it in proper condition.—Sinkey v. Board of County Com'rs of Mineral County, 396 P.2d 737, 80 Nev. 526.

Nev. 1962. Owner of an easement may prepare, maintain, and improve or repair the way in a manner and to an extent reasonably calculated to promote the purposes for which easement was created, but may not cause an undue burden upon servient estate nor an unwarranted interference with independent rights of others who have a similar right of use.—Cox v. Glenbrook Co., 371 P.2d 647, 78 Nev. 254, 10 A.L.R.3d 947.

N.M. 1969. Owner of a servient estate is under no obligation, in absence of special agreement, to repair or maintain the way but he who uses easement must maintain it in proper condition or suffer resulting inconvenience.—Kennedy v. Bond, 460 P.2d 809, 80 N. M. 734.

Okl. 1961. Continuous use for about 60 years of common stairway and hall in building constructed on adjoining lots raised presumption of grant of easement and owner of one lot was not entitled to demolish his portion of building, stairway and hall, in absence of showing change in condition requiring that new structures be erected or showing that existing building was dilapidated. 60 O.S.1951 §§ 49, 59.—Winterringer v. Price, 370 P.2d 918.

Okl. Where subdividers platted into lots land adjacent to city and offered it for sale to the public representing that they would install a sanitary sewer adequate to needs of the lots, and purchasers, relying on such representation, purchased lots, and subdividers installed sewer, septic tank and disposal unit on other land owned by subdividers, and sewer adequately served purchasers for several years, and subdividers sold land on which septic tank and disposal unit were located and destroyed sewer outlet for the lots, but subdividers constructed a new sewer, purchasers of lots were not required to pay any part of construction cost of new sewer or for maintenance thereof. 16 O. S.1951 § 14.—G. A. Nichols, Inc. v. Stoddard, 242 P.2d 742, 206 Okl. 240.

Or. Where road, in which plaintiff had easement by way of necessity had been built on route of a former logging railroad, had been used by plaintiff for log hauling, and was surrounded by areas used principally for production of timber, use of such road for log transportation would be a reasonable use, if road was kept in repair, and would be one which could have been foreseen when parties purchased their holdings, and, therefore, use by owners of servient estate of road for log hauling was not unreasonable, and plaintiff's remedy against contractor logging on servient estate was by decree requiring contracts to bear proportionate share of expense of maintaining road and not by injunction to prohibit contractor's use of road.—Van Natta v. Nys, 278 P.2d 163, 203 Or. 204, rehearing denied 279 P.2d 657, 203 Or. 204.

Where road, in which plaintiff had easement by way of necessity, was properly used by owners of servient tenement and their logging contractor for log hauling, cost of restoration and expense of future maintenance of road would have to be apportioned between plaintiff, as owner of dominant tenement, and owners of servient tenement upon some basis such as tonnage or board feet hauled or other alternative, and logging contractor operating on servient tenement and owners of servient tenement would be jointly and severally liable for road repair expense attributable to servient tenement owners during period when contractor used road.—Id.

Utah. The owner of a dominant estate having an easement has a right to enter upon servient estate, and make repairs necessary for reasonable and convenient use of the easement, doing no unnecessary injury to the servient es-

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For references to other topics, see Descriptive-Word Index.

Where defendant conveyed land reserving to himself, his heirs, successors, and assigns the right and easement to use all of a portion of the conveyed lands as a means of access to adjacent lands belonging to defendant, and city bought conveyed land from purchasers, defendant, his family, tenants, and servants, agents, employees, invitees and licensees, and all other persons desiring access to land from defendant's adjacent unconveyed lands, with defendant's permission, express or implied, were entitled to right of easement as to the reserved land as against the city. Rev.Code 1935, §§ 6754, 6852.—Id.

Or. Plaintiff, who had easement by way of necessity in road could not use it to exclusion of owners of servient tenement.—Van Natta v. Nys, 278 P.2d 163, 203 Or. 204, rehearing denied 279 P.2d 657, 203 Or. 204.

Owner of land upon which easement of way is imposed for benefit of another may use the way if his use does not unreasonably interfere with easement owner's rights.—Id.

Utah. An easement being a burden on the land which it traverses is limited to use for which or by which it was acquired, and to the person who acquired it, or for the benefit of the property for which it was acquired.—Nielson v. Sandberg, 141 P.2d 696, 105 Utah 93.

⇐53. Maintenance and repair.

Library references
C.J.S. Easements § 94.

Ariz. 1963. A landowner who is grantor of an easement is not required to maintain easement.—Gillespie Land & Irr. Co. v. Gonzalez, 379 P.2d 135, 93 Ariz. 152.

Ariz.App. 1972. A dominant owner, using due care not to needlessly increase burden of a servient tenement, has right to enter upon the servient tenement for purposes of upkeep and repairs of the easement and easement carries with it the right to do all acts necessary and proper in order to obtain full enjoyment of the easement.—Papa v. Flake, 503 P.2d 972, 18 Ariz.App. 496.

Owner of an easement has right to enter servient estate at all reasonable times to effect necessary repairs and maintenance.—Id.

Cal. Ordinarily, owner of servient tenement is under no duty to maintain or repair easement.—Herzog v. Grosso, 259 P.2d 429, 41 C. 2d 219.

Cal. An express or implied grant of an easement carries with it certain secondary easements essential to its enjoyment, such as right to make repairs, renewals, and replacements, and such incidental easements may be exercised so long as owner thereof uses reasonable care and does not increase burden on or go beyond boundaries of servient tenement, or make any material changes therein.—Ward v. City of Monrovia, 108 P.2d 425, 16 C.2d 815.

Cal.App. In action for damages resulting to plaintiffs' adjoining land from defendant's improvements to roadway which had been dedicated for use and benefit of adjoining lot owners such as parties to the action, evidence sustained finding that defendant's work on roadway was necessary and reasonable and was duly authorized and that plaintiffs had not suffered any material damage thereby.—Slaback v. Wakefield, 336 P.2d 609, 169 C.A.2d 40.

Cal.App. Where owner of land divides it into two parcels and sells, there is implied grant of all obviously used easements, and such easements carry secondary easement such as right to repair, etc., but there is no implied duty of owner of servient tenant to maintain and repair the right of way.—Bailey v. Superior Court In and For Shasta County, 297 P.2d 795, 142 C.A.2d 47.

Cal.App. Under Civil Code provision, that, if easement in nature of private right of way is owned by more than one person, "cost of maintaining it in repair" should be shared by each owner, paving of dirt road, which ran along a private easement, was not "maintaining it in repair". West's Ann.Civ.Code. § 845. —Holland v. Braun, 294 P.2d 51, 139 C.A.2d 626.

Some of owners of private easement over and along a dirt road did not have right, without consent of all abutting property owners, who were co-owners in the easement, to cut trees, install culverts, regrade, widen, and pave the road and enforce contribution from the dissenting owners toward cost of such improvements. West's Ann.Civ.Code, § 845.—Id.

Cal.App. Easement for purpose of traveling over undedicated road would not include any right to install poles on roadway.—Brown v. Voight, 246 P.2d 698, 112 C.A.2d 569.

Cal.App. Where property owner had easement over private road, property owner was entitled to install and maintain at entrance of road a street name sign and another property owner, who had similar easement, could maintain at same location a private road sign, as creation and maintenance of both signs would be consistent with rights of parties under respective easements.—Hucke v. Kader, 240 P.2d 434, 109 C.A.2d 224.

Cal.App. While a right of way is a privilege of passage over the land of another with implied right to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner, the owner of the right of way cannot so change the surface of the land as seriously to damage the usefulness of the servient estate. —White v. Walsh, 234 P.2d 276, 105 C.A.2d 828.

In action to enjoin defendants owning right of way across plaintiffs' lands from raising the right of way, evidence was sufficient to support findings that defendants were proceeding in a reasonable and proper manner to repair and raise elevation of right of way so that it would be usable as a road and that no damage would result to plaintiffs' land from such repairs.—Id.

Cal.App. The right to use property for road purposes carries with it a right to make necessary and reasonable improvements for the purpose for which it was intended.—Zimmerman v. Young, 169 P.2d 37, 74 C.A.2d 623.

Cal.App. Ordinarily the owner of an easement is required to keep it in repair, but the parties may alter their legal obligation by contract.—Rose v. Peters, 139 P.2d 983, 59 C.A. 2d 833.

An easement may be created by an executed oral agreement and the owner of the servient tenement may by agreement obligate himself to join in keeping the easement in repair.—Id.

Where the right to the operation of irrigation ditch across plaintiff's land under an easement was conceded, an agreement, under which plaintiff fenced both sides of the ditch and defendants improved and maintained ditch, could not be repudiated by plaintiff by bringing an action to enjoin the use of the ditch.—Id.

For references to other topics, see Descriptive-Word Index

tate.—Nephi Irr. Co. v. Bailey, 181 P.2d 215, 111 Utah 402.

Wash. Owner of easement by implied grant has burden of making any necessary improvements to the way.—Dreger v. Sullivan, 278 P. 2d 647, 46 Wash.2d 36.

Wash. Owners of dominant tenement had the right to regrade easement across land of owners of the servient tenement without any express grant from the owners of the servient tenement.—Hughes v. Boyer, 104 P.2d 760, 5 Wash.2d 81.

⇐54. Alteration.

Library references
C.J.S. Easements § 95.

Ariz. Generally, location of an easement cannot be changed by either party without other's consent, after it has been once established either by express terms of grant or by acts of parties, except under authority of an express or implied grant or reservation to that effect, but it is competent for parties to change location by mutual consent, and such consent may be implied by their acts and acquiescence, and after a change has been made by mutual consent general rule operates to prevent a further change of location by either party without other's consent.—Stamatis v. Johnson, 224 P.2d 201, 71 Ariz. 134, modified 231 P.2d 956, 72 Ariz. 158.

Courts have no power to compel parties to accept benefit conferred by change of easement without their consent even if it is shown that change would be of actual benefit to owner of easement and question is one of property rights, not of benefits or injuries.—Id.

Cal. Both parties to an easement have the right to insist that so long as it is enjoyed, it shall remain substantially the same as it was at time the right accrued, regardless of question as to relative benefit and damage that would ensue to parties by reason of change in mode and manner of its employment. Civ. Code, § 806.—Whalen v. Ruiz, 253 P.2d 457, 40 C.2d 294.

Cal. The nature of the enjoyment measures extent of rights under a general grant or a prescriptive easement, and precludes a subsequent alteration in or deviation from place, mode or manner of its enjoyment.—Ward v. City of Monrovia, 108 P.2d 425, 16 C.2d 815.

Cal.App. If change in use in easement is not in the kind of use, but merely one of degree imposing no greater burden on servient estate, right to use easement is not affected. —Gaither v. Gaither, 332 P.2d 436, 165 C.A.2d 782.

Cal.App. When once fixed, the location and extent of easement cannot be materially changed by either party without consent of the other, even though change might benefit the servient estate, but the owner of the easement can make the way as usable as possible for the purpose of the right owned so long as he does not increase the burden on the servient tenement or unreasonably interfere with the rights of the owner thereof.—White v. Walsh, 234 P.2d 276, 105 C.A.2d 828.

Cal.App. Where grant of easement is general as to extent of burden to be imposed on servient tenement, exercise of right granted in particular course or manner with acquiescence and consent of both parties fixes and limits right to particular course or manner in which it has been enjoyed and easement cannot be changed at pleasure of grantee. Civ.Code, § 806.—Woods Irr. Co. v. Klein, 233 P.2d 48, 105 C.A.2d 266.

Hawaii 1965. Where grant of an easement is unrestricted, use of dominant tenement may reasonably be enlarged or changed.—Cooper v. Sawyer, 405 P.2d 394, 48 Haw. 394, 538.

Mont. 1964. So long as use of an easement is confined to the purposes under which it was acquired and created without increasing the burden on the servient estate, owner of the easement may make changes that do not impair or affect its substance.—Shammel v. Vogl, 396 P.2d 103, 144 Mont. 354.

N.M. Owner of easement can make no alteration in dimensions, location or use of his easement which increases burden on servient estate or by which servient estate is damaged, except by consent of owner of servient estate. —Posey v. Dove, 257 P.2d 541, 57 N.M. 200.

Or. 1962. Under right-of-way agreement giving defendants right to install additional gates along right-of-way but not permitting more than three additional gates, with option at their expense to install and maintain cattle guards of sufficient width to turn livestock in lieu of gates permitted, defendants did not have right to substitute a cattle guard and stock gate for any gate placed across the right-of-way, including the gate at the highway.—Gorman v. Jones, 375 P.2d 821, 232 Or. 416.

Principle that use of an easement may be expanded with changes in character of use of dominant tenement is applicable only when it can be said that the parties intended such expanded use.—Id.

Right-of-way agreement providing for a gate where road joined highway and giving defendants right to construct or install not more than three additional gates with option to install and maintain cattle guards in lieu of any gates permitted, a limitation was placed upon character of use, and use of easement could not be expanded with changes in character of use of dominant tenement.—Id.

Utah. Needs of society and concomitant policy of law favor changes and improvements for benefit of dominant estate so long as parties' intent of parties does not disallow changes and burden to servient tenement is not increased. —Huble v. Cache County Drainage Dist. No. 3, 259 P.2d 893, 123 Utah 405.

Utah. Where there are several owners in common of easement, neither one can make any alterations which will render it less convenient and useful to any appreciable extent to any one of the others.—Big Cottonwood Tanner Ditch Co. v. Moyle, 174 P.2d 148, 109 Utah 213.

Utah. Where deed reserved to grantors perpetual right to maintain and use platform "now located" on property conveyed, a new concrete ramp covering a greater portion of the property than original property was an additional burden on the servient estate, and justified decree requiring removal of the concrete ramp except from that portion of the servient estate formerly covered by the platform.—Merrill v. Bailey & Sons Co., 106 P.2d 255, 99 Utah 323.

⇐55. Misuser.

Library references
C.J.S. Easements § 93.

Ariz. In action seeking to require defendants to limit their use of easement granted by former judgment to its use for road purposes

ANNOTATION

RIGHT OF SERVIENT OWNER TO MAINTAIN, IMPROVE, OR REPAIR EASEMENT OF WAY AT EXPENSE OF DOMINANT OWNER

This annotation discusses the right of a servient owner to maintain, improve, or repair an easement or right of way[1] at the expense of the dominant owner.

Cases involving disputes between co-owners of an easement as to sharing the cost of maintaining, improving, or repairing an easement are not included herein, as involving distinct problems of use, ownership, and consent.

In the following case, it was held that a servient owner could improve an easement of way and recover a part of his expenditures for such improvement from the dominant owner where the grant of easement providing for such contribution was found to govern the particular fact situation. Thus, where a grant of easement stipulated that costs of improving a right of way would be shared equally by the dominant and servient owners, and the court determined that the dominant owner agreed to the construction of a roadway on the easement, it was held in McManus v Sequovah Land Associates (1966) 240 Cal App 2d 348, 49 Cal Rptr 592, 20 ALR3d 1015, that the servient owner could improve the easement of way and recover one-half of such costs from the dominant owner.[2]

And while a grant of easement of a

1. A right of way is the privilege which one person or particular class of persons may have of passing over the land of another in some particular line. 25 Am Jur 2d, Easements and Licenses § 7.

2. In so holding, the court distinguished Holland v Braun (1956) 139 Cal App 2d 626, 294 P2d 51, a case not within the scope of this annotation, wherein it was held that some of the owners of a private easement over and along a dirt road did not have the right, without the consent of all the owners of abutting property who were co-owners of the easement, to pave the road and enforce contribution from the dissenting owners under a statute which provided that if an easement was owned

TOTAL CLIENT SERVICE LIBRARY REFERENCES

25 Am Jur 2d, Easements and Licenses §§ 85, 86

5 Am Jur Legal Forms, Easements, Forms 5:625, 5:627, 5:639, 5:656–5:660

ALR Digests, Easements §§ 54, 55

ALR Quick Index, Easements; Repairs and Maintenance; Right of Way

right of way was silent as to whether the costs of repairing the right of way would be shared by the servient and dominant owners, the court in Bina v Bina (1931) 213 Iowa 432, 239 NW 68, 78 ALR 1216, held that the servient owner of the easement could repair the road and recover from the dominant owner a proportionate share of the money expended, where the facts disclosed that the dominant owner, as well as the servient owner, derived benefits from the use of the road.

Although the following case does not involve the specific question of the right of a servient owner to maintain, improve, or repair an easement of way at the expense of the dominant owner, attention is called to Barnard v Gaumer (1961) 146 Colo 409, 361 P2d 778, wherein the court, upon holding that the trial court had erred in ordering that the owner of lands over which an easement was granted must maintain the roadway, in that not all owners of the land were parties to the litigation, noted that, absent any agreement on the question of maintenance of a private way, the burden of upkeep should be distributed between dominant and servient tenements in proportion to their relative use of the road, as nearly as could be ascertained.

✦

The following annotations are of a related nature:

Right of owners of parcels into which dominant tenement is or will be divided to use right of way. 10 ALR3d 960.

Extent of, and permissible variations in, use of prescriptive easements of way. 5 ALR3d 439.

Extent and reasonableness of use of private way in exercise of easement granted in general terms. 3 ALR3d 1256.

Width of way created by express grant, reservation, or exception not specifying width. 28 ALR2d 253.

Rights and duties of owners inter se with respect to upkeep and repair of water easement. 169 ALR 1147.

Right of owner of easement of way to make improvements or repairs thereon. 112 ALR 1303.

Right of owner of servient estate to alter conditions essential to enjoyment of easement in connection with stairway, or other part of building. 101 ALR 1292.

D. E. EVINS.

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by more than one person, the cost of maintaining it in repair should be shared by the owners of the abutting property, the court saying that the paving of the road was not "maintaining it in repair" within the meaning of the statute, but rather an improvement, and that without the consent of the defendants, the plaintiffs could not enforce contribution from the defendants for this work.

agreement to this effect the owner of the servient estate is under no obligation to construct fences along the course of a way,[41] or to erect gates across it,[42] for the benefit of the owner of the way. As appears in § 98 infra, he may, however, subject to certain restrictions, erect such gates and fences for his own convenience and the protection of his property. It is the duty of the owner of the way to close and fasten such gates after he has passed through, and on his failure to do so he may be enjoined from using the way,[43] and will be liable for any damages resulting thereby to the servient estate.[44] He will also be liable in an action of trespass for removing or injuring the gates.[45] However, the owner of the easement can only be required to use reasonable care to close the gates whenever he or those in his employment or under his control have occasion to use the way, or when he discovers that they have been left open by the act or neglect of another.[46]

Pipe line easement. In the absence of special agreement to the contrary, it has been held to be the duty of an owner of a pipe line easement to repair breaches in fences inclosing the servient tenement when such breaches are made in the construction of the pipe line.[47]

c. Injury Resulting From Failure to Repair

If the character of the easement is such that a failure to keep it in repair will result in injury to the servient estate or to third persons, the owner of the easement will be liable in damages for the injury so caused.

If the character of the easement is such that a failure to keep it in repair will result in injury to the servient estate,[48] or to third persons,[49] the owner of the easement will be liable in damages for the injury so caused. An action for such damages is not barred by an agreement on the part of the servient owner to pay a part of the costs of repairs.[50] On the other hand the owner of the servient tenement is not liable to a third person for injuries sustained through want of repair of a way[51] or bridge connected with such way.[52]

d. Right to Make Repairs

Subject to qualifications, the owner of the dominant estate may do whatever is reasonably necessary to the enjoyment of the easement and to keep it in a proper state of repair.

The owner of the dominant estate may do whatever is reasonably necessary to the enjoyment of the easement and to keep it in a proper state of repair,[53] provided it is done without imposing unnec-

41. Ky.—Flener v. Lawrence, 220 S.W. 1041, 187 Ky. 384.
W.Va.—Wiley v. Ball, 79 S.E. 659, 72 W.Va. 685.
19 C.J. p 981 note 87.

42. Md.—Rowe v. Nally, 32 A. 198, 81 Md. 367.
Mass.—Dunham v. Dodge, 126 N.E. 663, 235 Mass. 367.

43. Tex.—M. & M. Pipe Line Co. v. Menke, Civ.App., 45 S.W.2d 344, 346, error refused, quoting **Corpus Juris.**
19 C.J. p 981 note 90.

44. Iowa.—Amondson v. Severson, 37 Iowa 602.
Tex.—M. & M. Pipe Line Co. v. Menke, Civ.App., 45 S.W.2d 344, 346, error refused, quoting **Corpus Juris.**
19 C.J. p 981 note 91.

45. Iowa.—Houpes v. Alderson, 22 Iowa 160.
19 C.J. p 981 note 92.

46. Iowa.—Rater v. Shuttlefield, 125 N.W. 235, 146 Iowa 512, 44 L.R.A., N.S., 101.
19 C.J. p 981 note 94.

47. Tex.—M. & M. Pipe Line Co. v. Menke, Civ.App., 45 S.W.2d 344, error refused.

48. Ky.—Wells v. North East Coal Co., 118 S.W.2d 555, 557, 274 Ky. 268, quoting **Corpus Juris.**
19 C.J. p 981 note 95.

49. Cal.—Richardson v. Kier, 34 Cal. 63, 91 Am.D. 681.
Ky.—Wells v. North East Coal Co., 118 S.W.2d 555, 557, 274 Ky. 268, quoting **Corpus Juris.**
Pa.—Reed v. Allegheny County, 199 A. 187, 330 Pa. 300.

50. N.Y.—Fritcher v. Anthony, 20 Hun 495.

51. Cal.—Galiano v. Pacific Gas & Electric Co., 67 P.2d 388, 20 Cal. App.2d 534.
19 C.J. p 981 note 98.

52. W.Va.—Carson v. Jackson Land & Mining Co., 111 S.E. 846, 90 W. Va. 781.

53. Cal.—Pacific Gas & Electric Co. v. Crockett Land & Cattle Co., 233 P. 370, 70 Cal.App. 283.
19 C.J. p 981 note 99.

Easement by prescription implies the right to make repairs if such repairs do not injuriously increase the burden on the servient tenement. —City of Gilroy v. Kell, 228 P. 400, 67 Cal.App. 734.

Fact question

The question of what acts of repair are reasonable in the use and enjoyment of an easement is one of fact in each particular case, and depends on the extent and character of the lawful use of the easement.
Ill.—Doan v. Allgood, 141 N.E. 779, 310 Ill. 381—Sell v. Finke, 129 N. E. 90, 295 Ill. 470.
Mass.—Guillet v. Livernois, 8 N.E. 2d 921, 297 Mass. 337, 112 A.L.R. 1300.

Right of way

(1) An owner of a way may do whatever is reasonably necessary to its enjoyment and to keep it in proper repair, provided due regard is had to the rights of the servient owner and others entitled to use the way.
Ill.—Doan v. Allgood, 141 N.E. 779, 310 Ill. 381.
Iowa.—Bina v. Bina, 239 N.W. 68, 213 Iowa 432, 78 A.L.R. 1216.
Ky.—Morgan v. Morgan, 266 S.W. 35, 205 Ky. 545.
Mass.—Mt. Holyoke Realty Corporation v. Holyoke Realty Corporation, 11 N.E.2d 429, 298 Mass. 513—Guillet v. Livernois, 8 N.E.2d 921, 297 Mass. 337, 112 A.L.R. 1300—New York Cent. R. Co. v. Ayer, 136 N. E. 364, 242 Mass. 69.
Minn.—Bruns v. Willems, 172 N.W. 772, 142 Minn. 473.
Miss.—Quin v. Sabine, 183 So. 701, 183 Miss. 375.
Mo.—Stotzenberger v. Perkins, 58 S. W.2d 983, 332 Mo. 391.
N.J.—U. S. Pipe Line Co. v. Delaware, L. & W. R. Co., 41 A. 759, 62 N.J.Law 254, 278, 42 L.R.A. 572.
N.Y.—Mann v. Groom, 231 N.Y.S. 342, 133 Misc. 260.
Pa.—Cain v. Aspinwall-Delafield Co., 137 A. 610, 289 Pa. 535.

State of Montana

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Board of Public Education

EXHIBIT 3
DATE 2-02-89
HB 467

February 2, 1989

Claudette Morton
Executive Secretary

TO: Members of the House Highways & Transportation Committee

FROM: Claudette Morton
Executive Secretary

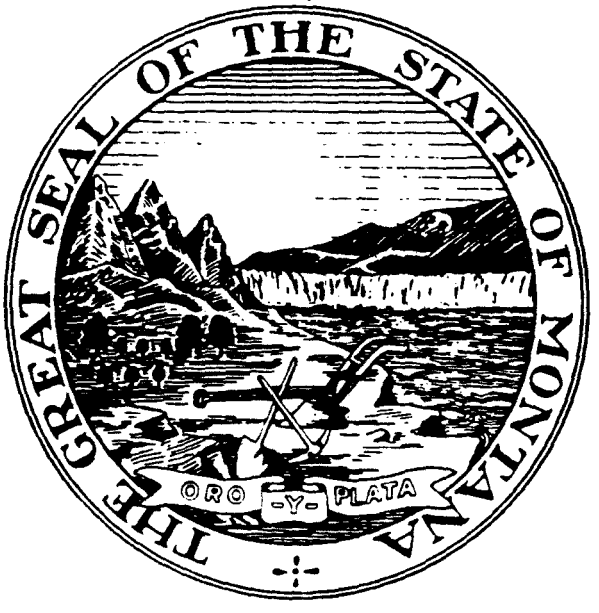
RE: Testimony in Support of HB 467

The Board of Public Education has the legislative responsibility of setting the requirements, not in law, for school bus drivers. We work with the Office of Public Instruction and the Federal government in keeping these requirements appropriate and up-to-date. In this way we can assure the students of Montana a strong measure of safety when they are transported by school bus. HB 467 simply is bringing the legal requirements in conformance with recognized appropriate practice. It is a house keeping bill, and we would urge your support of it.

Thank you.

EXHIBIT 4
DATE 2-02-89
HB 467

Montana
Pupil Transportation Handbook



State of Montana
Office of Public Instruction
State Capitol
Helena, Montana 59620

1988

HOUSE BILL NO. 165

INTRODUCED BY ELLISON, WALLIN

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING PAYMENT OF REGISTRATION AND DECAL FEES FOR OFF-HIGHWAY VEHICLES; REQUIRING A CERTIFICATE OF OWNERSHIP; PROVIDING FOR LICENSING OF OFF-HIGHWAY VEHICLE DEALERS; CREATING AN OFF-HIGHWAY VEHICLE RECREATIONAL USE ACCOUNT; AMENDING SECTIONS 23-2-801, 23-2-803, 23-2-804, 23-2-806, AND 23-2-807, MCA; REPEALING SECTION 23-2-805, MCA; AND PROVIDING A DELAYED EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 23-2-801, MCA, is amended to read:

"**23-2-801. Definitions.** As used in this part, unless the context clearly indicates otherwise, the following definitions apply:

(1) (a) "Off-highway vehicle" means a self-propelled vehicle used for recreation or cross-country travel on public lands, trails, easements, lakes, rivers, or streams. The term includes but is not limited to motorcycles, quadricycles, dune buggies, amphibious vehicles, air cushion vehicles, and any other means of land transportation deriving motive power from any source other than muscle or wind.

HB165
2/2/89

Amendments to House Bill No. 165
First Reading Copy

For the Committee on Highways and Transportation

Prepared by Paul Verdon
February 5, 1989

1. Title, line 5.
Following: "REGISTRATION"
Insert: ", SPECIAL WEED CONTROL,"

2. Title, line 9.
Strike: "AND"

3. Title, line 10.
Following: "23-2-807,"
Insert: "AND 61-3-510,"

4. Page 2, line 23.
Strike: "and"
Insert: "or"

5. Page 5, line 16.
Following: line 15
Insert: "(3) To effect by operation of law a transfer of interest in an off-highway vehicle, the provisions of 61-3-201(3) are applicable."
Renumber subsequent subsections

6. Page 6, line 17.
Following: "section"
Strike: "10"
Insert: "11"

7. Page 6, lines 20 and 21.
Following: "ownership" on line 20
Strike: the remainder of line 20 and through "justice" on line 21

8. Page 6, line 22.
Following: "owner"
Insert: "in accordance with the provisions of this part"

9. Page 7, lines 8 and 9.
Strike: "county treasurer"
Insert: "department of justice"

10. Page 7, line 15.
Following: "section"
Strike: "10"
Insert: "11"

11. Page 8, line 7.
Strike: "$21"
Insert: "$2"

12. Page 9, lines 18 and 19.
Strike: "fish, wildlife, and parks"
Insert: "justice"

13. Page 9, line 22.
Following: "(a)"
Insert: "(i)"

14. Page 9, line 23.
Following: "~~year.~~"
Insert: "and"

15. Page 9, line 24.
Strike: "(b)(i)"
Insert: "(ii)"

16. Page 10, line 1.
Strike: "(ii)"
Insert: "(b)"

17. Page 10, line 5.
Following: "receipt;"
Strike: "and"

18. Page 10, line 6.
Following: line 5
Insert: "(c) the weed control fee provided for in 61-3-510; and"
Renumber: subsequent subsections

19. Page 10, line 13.
Following: "in"
Insert: "an interest-bearing account"

20. Page 10, line 15.
Following: "parks"
Strike: ", and of which"
Insert: ". The decal fee and the interest and income to the account must be spent as follows"

21. Page 10, lines 18 through 21.
Following: "$1" on line 18
Strike: the remainder of line 18, lines 19 and 20 in their entirety, and line 21 through "11]"
Insert: "must be spent to develop and implement a comprehensive program and to plan appropriate off-highway vehicle recreation use except that:

(i) no money may be spent for this purpose before January 1, 1991; and

(ii) evaluation for development of a program plan must begin January 1, 1991"

22. Page 10, line 22.
Following: line 21
Insert: "NEW SECTION. Section 8. Duplicate decal. If a decal

required in [section 7] indicating that the off-highway vehicle fee has been paid for the current year is lost, mutilated, or becomes illegible, the person to whom it was issued shall immediately apply for and obtain a duplicate decal upon payment of a fee of $5 to the county treasurer, who shall distribute the fee as provided in 23-2-804(3)."
Renumber: subsequent sections

23. Page 11, lines 9, 10, and 11.
Following: "fine" on line 9
Strike: the remainder of line 9, the entirety of line 10, and through "year" on line 11
Insert: "of $50"

24. Page 11, lines 14 and 15.
Following: "~~earmarked~~" on line 14
Strike: the remainder of line 14 and through "to" on line 15
Insert: "account created under 23-2-804(3). This money and the interest earned on it must"

25. Page 11, line 17.
Following: line 16
Insert: "**Section 11.** Section 61-3-510, MCA, is amended to read:
"**61-3-510. Weed control fee.** (1) A special weed control fee of 50 cents must be assessed on the annual registration or reregistration of each motor vehicle subject to registration. The fee must be collected by the county treasurer.
(2) For purposes of this section, motor vehicle includes:
(a) motor vehicle as defined in 61-1-102;
(b) motorcycle as defined in 61-1-105;
(c) motor-driven cycle as defined in 61-1-106; ~~and~~
(d) quadricycle as defined in 61-1-133; and
(e) off-highway vehicle as defined in 23-2-801.
(3) The following vehicles are exempt from the fee:
(a) vehicles owned or controlled by the United States or a state, county, or city;
(b) vehicles exempt from payment of registration fees by 61-3-321(7); and
(c) vehicles or equipment which is not self-propelled or which requires towing when moved upon a highway of this state.""
Renumber: subsequent sections

26. Page 11, line 18.
Following: "(1)"
Strike: "A"
Insert: "Unless the dealer is licensed under the provisions of 61-4-101, a"

27. Page 12, line 13.
Following: "year;"
Insert: "or"

28. Page 12, line 20.
Following: "on"
Strike: "June 30"

Insert: "December 31"

29. Page 12, line 25 and page 13, line 1.
Following: "used" on page 12, line 25
Strike: the remainder of line 25 and through "programs" on page 13, line 1
Insert: "by the department of justice for the administration of [this act]"

30. Page 13, lines 3 through 5.
Following: "collected" on line 3
Strike: the remainder of line 3, the entirety of line 4, and through "to" on line 5
Insert: "must be deposited in the the account provided in 23-2-804(3). This money and the interest earned on it must"

31. Page 13, line 7.
Strike: section 11 in its entirety
Renumber: subsequent sections

32. Page 13, line 25.
Strike: "10,"
Strike: "11"
Insert: "12"

33. Page 14, line 3.
Strike: "10,"
Strike: "11"
Insert: "12"

34. Page 14, line 4.
Following: line 3
Insert: "NEW SECTION. Section 16. Coordination instruction. If House Bill No. 477, including amendments to 23-2-803 to require deposit of a portion of the fee in lieu of tax on off-highway vehicles in the noxious weed trust fund, is passed and approved, the following provisions of [this act] are void:
(1) [section 11]; and
(2) those amendments to 23-2-804 relating to imposition of the weed control fee on off-highway vehicles."
Renumber: subsequent section

VISITORS' REGISTER

Highways & Transportation COMMITTEE

BILL NO. 467 DATE Feb. 2

SPONSOR _____

NAME (please print)	RESIDENCE	SUPPORT	OPPOSE
Terry Brown	OPI Helena	✓	
~~Tom Hopgood~~	~~Mont Ass~~		
Tom Hopgood	Mt Assoc. Realtors HB536		✓
Tony Cameron	Board Public Education	✓	
Claudette Morton	Board of Public Ed	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

VISITORS' REGISTER

Highways COMMITTEE

BILL NO. 467 DATE 2 Feb 85

SPONSOR

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Thomas N. Lee	House Dist 49	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

ROLL CALL VOTE

Highways and Transportation COMMITTEE

DATE Feb. 2, 1989 BILL NO. Gray bill 165 NUMBER 1

NAME	AYE	NAY
Rep. Bachini, Bob	✓	
Rep. Davis, Ervin	✓	
Rep. Harrington, Dan		
Rep. O'Connell, Helen		
Rep. Steppler, Don	✓	
Rep. Westlake, Vernon		✓
Rep. Aafedt, Ole	✓	
Rep. Campbell, Bud	✓	
Rep. Clark, Robert	✓	
Rep. Owens, Lum	✓	
Rep. Patterson, John	✓	
Rep. Roth, Rande	✓	
Rep. Zook, Tom	✓	
Chairman Stang, Barry "Spook"		✓
Vice Chairman Linda Nelson	✓	

TALLY 11 2

Secretary Chairman

MOTION: Rep. Clark made the motion to adopt Gray Bill #1. The motion carried 11/2.

Form CS-31
Rev. 1985