

MINUTES OF MEETING
SENATE JUDICIARY COMMITTEE
February 3, 1979

The twenty-fifth meeting of the Senate Judiciary Committee was called to order by Senator Everett R. Lensink, Chairman in Room 331 of the capitol building at 9:37 a.m.

ROLL CALL:

All members were present.

CONSIDERATION OF SENATE BILL 243:

Senator Towe gave an explanation of this bill and stated that it was requested by the attorney general's office. This bill is an act to revise the statutes regarding the procedure for obtaining and dissolving or modifying preliminary injunctions and temporary restraining orders, etc. He introduced Mike McGrath from the attorney general's office, who stated that they had found a number of cases where the state is a party, that a court had entered a temporary restraining order against a state board without any hearing. The order was in effect for 2 1/2 years and he stated that he personally felt that twenty days might be more reasonable. He offered many amendments to this bill. (See Exhibit I.) He said that there were two things the amendments hoped to do - (1) add a preliminary injunction to the process and (2) broaden the scope of a temporary restraining order. He also said that it would not be necessary to get a temporary restraining order from some kind of an emergency situation and he explained that the most significant amendment is #3, which adds a whole new section.

There were no further proponents and no opponents.

J.C. Weingartner, representing the State Bar Association, gave a statement saying that they have problems with page 5, section 7, regarding the extension of temporary restraining orders and he said that he was not sure if they could just make a telephone call; and he thought that that section should be more specific and allow for telephone calls. He noted that some judges are just not available in this time frame.

Mike Young, Administrator for the Insurance and Legal Division of the Department of Administration, made a statement and said that it was too narrow in scope and recommended changes.

Senator Olson wondered why the amendments were not in the original bill. Mike McGrath stated that this was his fault, that when they originally put the bill together, they were only referring to temporary restraining orders but that it would have no purpose unless preliminary injunctions were handled as well.

There was some discussion on the effect of section 27-19-303 between Senator Towe and Mike McGrath, which is amendment #4 on the amendments introduced by Mike McGrath. Mr. McGrath stated that the possibility of getting a temporary restraining order without filing a lawsuit is why this amendment is there.

There were no further questions and the hearing on this bill was closed.

CONSIDERATION OF SENATE BILL 261:

Senator Turnage gave an explanation of this bill, which is an act to provide sovereign immunity from liability resulting from the design, construction, maintenance, and improvement of public highways and from dangerous surface conditions caused by weather.

Mike Young, administrator for the Insurance and Legal Division of the Department of Administration, gave a statement in support of this bill. He testified that they anticipate six cases a year and figure on one-fourth of a million dollar loss a year and that they had paid out in one year \$785,000.00 in losses on highway design cases and that many involved winter weather conditions and that more and more these cases involved multi-car accidents. He stated that Montana has thousands of miles of road to maintain, that it doesn't matter what kind of road we are talking about, and they have no specific figures on claims.

Jim Beck, Chief Right-of-Way Attorney for the Legal Division of the Department of Highways, gave a statement in support of this bill and he stated that he feels that this is something that does need to be carried out.

Michael Stephens, representing the Montana Association of Counties, gave a statement in support of this bill.

Dan Mizner, representing the Montana League of Cities and Towns, stated that the cost of liability insurance is multiplying, that the taxpayers are getting hit pretty hard, the cost of defense alone is multiplying and thereby the costs to cities and towns and they, therefore, support this bill.

Glen Drake, representing the American Insurance Association, said that one of the major costs in writing insurance is this cost factor of highway design and the cost of defending lawsuits. He said that this has to be the major portion of any policy and that this is the type of case where sovereign immunity should be available if the people of Montana believe in sovereign immunity at all.

Mike Meloy, representing the Montana Trial Lawyers' Association, gave a statement in opposition to this bill. He said that no one yet has mentioned the word "negligence" and this

bill excuses the state of Montana for any negligence that it may participate in and, therefore, causing injury to its citizens. He further said that in 1964, the people of Montana abolished the concept of sovereign immunity and if in the spring, there were chuck holes getting bigger and bigger, the authority is notified, no one comes out and fills it in, this bill would excuse the authority who should have filled in that hole.

Richard Anderson, representing himself, stated that in 1974, a family named Sect had an accident between Livingston and Whitehall, they hit black ice on a curve, went through the guardrail and into a 600 foot embankment. He stated that right at that curve, where there had been thirteen accidents, the guardrail had never been installed. He also testified that four and a half years before the Sect family was killed, there was an accident where the wife was decapitated, the father and two children were killed and two children survived. He stated that the jury unanimously found negligence on the part of the state of Montana to be the cause of the death of the members of this family; and he wondered should the state be accountable. He stated that the net cost to fix these guardrails after the Sect family was killed was \$168.00. He further said that at the hearing, questions were being asked him what his experience was for this job and he testified that he had been an undertaker. He felt that with millions of dollars being spent to do a job and if they are not doing it, that they should be accountable and that they have nothing to fear if they are not negligent.

Mr. Jim Jones, an attorney, gave an example of an incident that occurred east of Ryegate. He stated that there is an older stretch of road that the highway department had talked of replacing for many years, that the road dropped away and below is the Musselshell River. He stated that there are no guardrails there and that a car driven by the Lamonts met an oncoming truck, they were blinded by the snow, and there were some old guardrail posts on the side of the road, that they struck one and dropped off into the river, the top of the car went down into the ice so that they couldn't open the doors and they drowned in the car. They found that there had been many prior accidents at that location - accidents where people had gone into that river - there had been four previous deaths at that corner but that this had occurred before sovereign immunity was abolished and the state could not be sued. He further stated that after suits were filed, guardrails were put up, but he said that the construction plans showed that guardrails had been planned for that curve and the plans were forty years old. He also testified that the greater portion of the \$785,000.00 that was paid out last year in claims was the result of one accident and that the guardrails were not installed until after sovereign immunity was abolished.

He also stated that there may be some alternatives - that some states set standards of limitations under which they may recover.

Senator Turnage commented that this may be a point where they take "malfeasance" out of the bill. He said that it is a question of economics and that it effects every city and county in the state.

See written testimony from City of Billings.

There were no further questions and the hearing on this bill was closed.

CONSIDERATION OF SENATE BILL 274:

Senator Thiessen from District 27, gave an explanation of this bill which provides that in lands acquired because of accretion or dereliction, the mineral rights belong to the owners of the mineral rights in the parcel of land which formed the basis for acquiring title to the accreted or derelict land. He stated that there seems to be a void in the law of the land, particularly people who have sold their land, but retained the mineral rights. Surface owners are claiming the mineral rights. He stated that this bill is trying to solve a problem and answer a question that needs to be answered by legislation.

Don Allen, representing the Montana Petroleum Association, stated that he is not for or against this bill, but he thought that there is a problem if they do not have some clearcut way of solving this.

There were no opponents.

Senator Towe stated that it was his understanding that minerals under the water probably belong to the person on the riverbed according to 1889 law. He also stated that we have to go back to the enabling act to find out who owns the river and streams.

Senator Anderson questioned if we could just see who pays the taxes on it.

Senator Towe suggested that Valencia Lane, the researcher for the committee, do some research into this matter and Senator Brown suggested that we contact the Department of State Lands because they have been involved.

The hearing on this bill was closed.

There being no further business, the meeting was adjourned at 11:08 a.m.

Everett Lensink
SENATOR EVERETT R. LENSINK, Chairman
Senate Judiciary Committee

Date 2/3/79

ROLL CALL

JUDICIARY COMMITTEE

46th LEGISLATIVE SESSION - 1979

NAME	PRESENT	ABSENT	EXCUSED
Lensink, Everett R., Chr. (R)	✓		
Olson, S. A., V. Chr. (R)	✓		
Turnage, Jean A. (R)			
O'Hara, Jesse A. (R)	✓		
Anderson, Mike (R)	✓		
Galt, Jack E. (R)	✓		
Towe, Thomas E. (D)	✓		
Brown, Steve (D)	✓		
Van Valkenburg, Fred (D)	✓		
Healy, John E. (Jack) (D)	✓		

Each Day Attach to Minutes.

Please sign and return to the library.

SENATE

COMMITTEE

BILL

VISITORS' REGISTER

DATE 2-3-79

Please note bill no.

NAME	REPRESENTING	BILL #	(check one) SUPPORT	OPPO
JARRY GRAHL	City of Billings	261	✓	
Carol L. Kirkland	Mont. Petroleum Ass.	274		
Mike Johnson	Dept. of Inv.	261	✓	
Chris K. Koch	W. Energy	261	✓	
Terrence O'Leary	Independent Min. Assoc. of Mt. 261		✓	
Michael Stephen	MT Assoc. of Counties	261	✗	
Rich Williamson	Mont. Min. Ass.	261	✓	
Jim Mackler	Mont. Coal Council	274		
Bill Murray	Mont. Min.	261	✓	
W.C. Neagamenee	Mont. Min.	261		
M. McWhitt	Mont. Min.	261	✓	
Debra Dinn	Business Regulation	54	✓	
Barbara Glavin	City of Polson City	261	✓	
David M. Higgins	Mont. Economic Dev. 261		✗	
Marie McLean	Mont. Dept. of Bridges	261	✗	
Mike May	Montana Iron Works 261			✓
Ellen Ochs	American Inv. Ass'n	261	✓	
Do Alls	Montana Petrol. Assn	274		?

Bills to be heard in Senate Judiciary Committee
Saturday, February 3, 1979

SB 274.

Watercourses.

Section 1.

Amend 70-18-201.

Increase of bank.

current law - provides that if land along a bank increases in size due to natural and gradual changes, the new land belongs to the owner of the bank. There is currently no express provision for a situation where the mineral rights and surface rights in the bank may be owned separately. This could result in a situation where the mineral rights in a newly acquired strip of land along a bank may belong to the surface owner while the mineral rights in the remainder of the tract belong to a separate mineral rights owner.

proposed bill - (1) changes title of the section from "alluvian or accretion" (which are essentially synonymous) to "accretion or dereliction" (accretion refers to deposit of new material; dereliction refers to recession of water). (2) provides that land newly acquired by accretion or dereliction will belong to the owner of the bank except that mineral rights in the newly acquired land will belong to the owner of the minerals rights in the bank. This would provide for uniform ownership in the mineral rights to the tract which would avoid many problems associated with co-ownership and retain the original intent of the owners.

SB 261.

Section 1.

New

Limitation on governmental liability.

current law - Under common law, a governmental entity cannot be sued without its permission. Title 2, chapter 9, parts 1 through 3, known as the Montana Comprehensive State Insurance Plan and Torts Claims Act, allows the state and political subdivisions to be sued for money damages for personal injury or property damage caused by negligent or wrongful acts or omissions of employees of the governmental entity acting in the scope of their employment except as specifically provided by the legislature (2-9-102).

proposed bill - provides an exception to governmental liability for damages related to public highways. The bill would make governmental entities immune from suits for injury or damages (a) arising out of the plan, design, maintenance, or improvement of a public highway, road, street, or bridge or (b) arising out of dangerous surface conditions due to weather conditions.

Section 1. Amend 27-19-301.

When notice of application required.

current law - a judge has the discretion to issue an injunction without notice if he feels that irreparable injury would result from the delay.

proposed bill - a court or judge could not issue a preliminary injunction without reasonable notice to the adverse party (except in cases involving corporations and the state - 27-19-302).

Section 2. Amend 27-19-305.

Restraining order.

proposed bill - changes, the name of a restraining order to temporary restraining order and deletes language about notice which is covered in section 4.

Section 3. New.

Form and scope of injunction or restraining order.

Specifies the form and scope of an injunction or restraining order.

Section 4. New.

When restraining order may be granted without notice.

Specifies the only situation when a temporary restraining order can be issued without notice.

Section 5. Amend 27-19-306.

Security for damages.

current law - a judge has discretion to require a person seeking an injunction or restraining order to give a written undertaking with sureties to cover damages caused to the adverse party if it is determined that the injunction should not have been granted.

proposed bill - requires a judge to require the party to give a written undertaking but gives the judge authority to waive the undertaking in the interest of justice.

Section 6. New.

Specifies the contents and filing of temporary restraining orders issued without notice; a temporary restraining order will expire in 10 days.

Section 7. New.

The expiration date can be extended.

Section 8. New.

When a restraining order is granted without notice, the application for the injunction is to be heard without delay.

Section 9. New.

The adverse party can ask the court to dissolve or modify a temporary restraining order granted without notice.

Section 10. Amend 27-19-401.

Section 11. Amend 27-19-406.

These 2 sections are amended to reflect new policy that an injunction cannot be granted without notice.

Amendments to introduced copy of Senate Bill No. 243, an act to revise the statutes regarding the procedure for obtaining and dissolving or modifying preliminary injunctions and temporary restraining orders.

1. Page 1.

Following: line 14

Insert: "Section 1. Section 27-19-201, MCA, is amended to read:

"27-19-201. When preliminary injunction may be granted. An injunction order may be granted in the following cases:

(1) when it shall appear by the complaint that the plaintiff applicant is entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) when it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the plaintiff, applicant;

(3) when it shall appear during the litigation that the adverse party defendant is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the plaintiff's applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

(4) when it appears by affidavit that the defendant, adverse party, during the pendency of the action, threatens or is about to remove or to dispose of his property with intent to defraud the plaintiff, applicant, an injunction order may be granted to restrain the removal or disposition."

Renumber: All subsequent sections

2. Page 1, line 23

Strike: "Except as provided in 27-19-302,"

Strike: "no"

Insert: "No"

3. Page 2.
Following: line 1
Insert: "New section. Section 3. When hearing on application required. Before granting an injunction the court or judge shall make an order requiring cause to be shown, at a specified time and place, why the injunction should not be granted and the adverse party may in the meantime be restrained as provided in 27-19-305,"

Renumber: all subsequent sections

4. Page 2.
Following: Section 3 above
Insert: "Section 4. Section 27-19-303, MCA, is amended to read:
27-19-303. Time of granting injunction, evidence required. The injunction order may be granted at the time of issuing the summons upon the complaint commencing the action or at any time afterward before judgment. upon the complaint, with or without affidavits to support it, and, in the other, the affidavits shall show satisfactorily that sufficient grounds exist therefor. An injunction order shall not be granted on the complaint alone unless:

{1} it be duly verified;
{2} the material allegations of the complaint setting forth the grounds therefor be made positively and not upon information and belief.

On the hearing of an application for an injunction each party may present affidavits or offer oral testimony."

Renumber: all subsequent sections

5. Page 4, line 10.
Following: "the"
Strike: "defendant"
Insert: "party enjoined"

6. Page 4, line 11.
Following: "the"
Strike: "plaintiff"
Insert: "party enjoined"
Following: "such"
Strike: "plaintiff"
Insert: "party"

7. Page 6, line 7.
Following: "injunction"
Strike: "granted without a hearing. If an"
8. Page 6, line 8.
Following line 7
Strike: "injunction order be granted without a hearing"
Strike: "the"
Insert: "The"
9. Page 6, line 9.
Following: line 8
Strike: line 9
Insert: "application may be made upon"
10. Page 6, line 14.
Following: "application"
Strike: "may be made upon the complaint and affidavit"
Insert: "must be supported by an affidavit showing
that there is not sufficient ground for the
injunction to continue or the scope of the
injunction is too broad."
11. Page 6, line 15.
Following: line 14
Strike: lines 15 and 16
12. Page 6.
Following: line 16
Insert: "Section 14. Section 27-19-403, MCA, is
amended to read:
"27-19-403. New undertaking for security
following hearing. Upon the hearing of an application
to vacate or modify an injunction order, the
court or judge may require a new undertaking, in
the same or a different sum, to be given by
the plaintiff, party which received the
injunction, with like sureties and to the like
effect as upon granting of the original order.
The persons executing the new undertaking become
liable thereon as if they had executed it upon
the granting of the original order. The persons
who executed the original undertaking remain
liable thereon until the new undertaking is
given and approved, and no longer. "
13. Page 6.
Following: Section 14
Insert: "Section 15. Section 27-19-405, MCA, is
amended to read:
"27-19-405. Defendant's Enjoined party's
undertaking for security upon dissolution. Upon
the hearing mentioned in 27-19-403, the court
or judge may vacate the injunction order
upon the defendant's enjoined party's executing
an undertaking in such form and amount

and with such sureties as the court or judge shall direct, conditioned to indemnify the plaintiff original applicant against loss sustained by reason of vacating such injunction order.

14. Page 6, line 20.
Following: "granted"
Strike: "without a hearing"
15. Page 6, line 24.
Following: "the"
Strike: "plaintiff"
Insert: "party which received the injunction"
16. Page 7, line 2.
Following: line 1
Insert: "Section 15. Repealer. Section 27-19-302, 27-19-304, 27-19-311, and 27-19-402, MCA, are repealed."



CITY OF BILLINGS

220 NORTH 27TH STREET
P. O. BOX 1178
BILLINGS, MONTANA 59103
PHONE (406) 248-7511

February 2, 1979

Montana Senate Judiciary Committee
Montana Senate
Helena, MT 59601

RE: Testimony - Senate Bill #261

Dear Sirs:

I would like to enter this written testimony in support of Senate Bill #261. As Public Works Director for the City of Billings, I am responsible for all street construction, reconstruction, and maintenance activities for the City of Billings. In this position there are several National publications which I receive on a weekly or monthly basis which do have legal briefs of court judgements and decisions in other localities. These legal briefs very vividly point out the potential liability that could be incurred by local governments in the process of constructing, reconstructing, or maintaining the streets of the City as it relates to weather conditions.

Experience in other jurisdictions has shown that whenever a tort or liability action is brought against a governmental unit, the funds used to pay this action are the same funds which could probably be better utilized to eliminate the hazard for the remainder of the traveling public.

I would like to go on record through this letter as supporting Senate Bill #261.

Sincerely,

A handwritten signature in black ink, appearing to read "Ken Haag, P.E." The signature is written in a cursive style with a long, sweeping line.

Ken Haag, P.E.
Director of Public Works

KH/kh