MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

January 14, 1985

The fifth meeting of the Senate Judiciary Committee was called to order at 10:00 a.m. on January 14, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF SB 28 AND 69: Chairman Mazurek stated the hearings on SB 28 and SB 69 would be held simultaneously since the bills were similar and on the same topic. Senator Dorothy Eck, the sponsor of SB 28, stated SB 28 was presented by request of the Select Committee on Indian Affairs. Senator Eck submitted amendments prepared by the Select Committee on Indian Affairs (see Exhibit 1) and provided the committee with code statutes dealing with the Reserved Water Rights Compact Commission (see Exhibit 2). Senator Eck expressed some concern over the provision in SB 69 stating no compact proceedings may commence after July 1, 1985. She requested that the committee not act on this particular matter until we are sure this does not create a public relations problem with the tribes. Senator Eck suggested an amendment be considered making the cutoff date January 1, 1986. Senator Eck stated she felt her fourth and fifth proposed amendments were substantive. As it appears every compact will be quite different and some may require approval by Congress, although some may require no federal approval or some may need approval by the Department of Interior, assuming these requirements are written into the compact, she feels we should not even mention Congress in our legislation and feels the problem is best solved by deleting that language entirely. Senator Eck felt the committee might want to consider amending page 6, line 18, of SB 28 by deleting the word "approval" and inserting the word "ratification," as that may be a more appropriate word. Senator Eck then addressed subsection 3, which was amended in 1981, which speaks in three places about the tribes or federal agency. They determined that the "or federal agency" really refers to compacts that are being negotiated with federal agencies. Since all of these are dealt with in Section 85-2-703, MCA, it is repetitious and confusing to have that language in this section, and deletion of it is really a housekeeping measure. Senator Eck then referred to page 6 of SB 28, lines 21 and 23, and the phrases "and unless renegotiated" and "without alteration." She stated it has been suggested that they could omit those phrases. Senator Eck provided the committee with a letter from Brenda Desmond to Chief Water Judge, Judge W. W. Lessley, and Judge Lessley's response (see Exhibit 3) which

expressed his concerns and approval of what was being done. Senator Eck is glad this bill is before the Judiciary Committee as she believes there are a good many legal points that must be considered. Senator Eck further believes it is an issue that is very important to our whole water adjudication process.

Senator Galt, sponsor of SB 69, explained that his bill is introduced by request from the Reserved Water Rights Compact Commission. The commission was instituted under SB 76 in 1979, which also authorized general adjudication of water in the state of Montana and the quantification of that water. Senator Galt explained how the members were appointed to the commission. He further explained the commission is not answerable to any agency of the government, although everything the commission comes up with will be presented to the legislature. He explained that Section 1 of SB 69 states the commission will be reporting to Judge Lessley or his successor; Section 2 extends the compact commission sunset provisions for another two years. Since the commission is just in existence as long as it is negotiating, this will give it two more years to complete negotiations. Senator Galt stated that regarding Section 3, the only agency or tribe that is not in negotiations right now is the Blackfeet Tribe. The commission has met with them, and they have been kept informed of the actions taking place. Senator Galt believes the July 1, 1985, deadline for commencement of negotiations should remain in there. Senator Galt stated the termination provisions in Section 4 were set in SB 76 and any negotiations can be terminated by writing to the opposite party 30 days before the proposed termination date. This would give parties who have terminated a chance to retract that termination and come back to negotiations. Also, the tribes and agencies can terminate. In addition, the commission can terminate. Senator Galt stated he would propose some amendments in executive session (see Exhibit 4). Senator Galt explained that reserved water right holders do not have to prove they are using or holding the water. Their priority date is the date the water reservation was made. Although they don't have to prove the use of the water, they have that water forever. Since their rights are different than water users' rights, they need another form that doesn't require information that is not pertinent to them.

PROPONENTS: K. M. Kelly, representing the Montana Water Development Association, stated they presently do not have any position on either bill except they presently support the concept that the commission should be extended. They find no fault with either bill, although they hope one bill would come out. They lean toward Senator Galt's bill because it comes from the commission itself, and the commission should know what it needs. (See witness sheet attached as Exhibit 5.) Linda Hickman, a water master from the Water Court in Bozeman, stated Judge Lessley asked her to come to this hearing to state he feels the commission has done and is doing a fine job. The Water Court is not opposed

to a two-year extension, although the judge and the court would like to see a provision in the bill which would require the commission to make periodic progress reports to the Water Court, since the legislature has mandated they expedite negotiations in the state. (See witness sheet attached as Exhibit 6.) Daniel Decker, tribal attorney for the Confederated Salish and Kootenai Tribes, appeared on behalf of the tribes to speak out in support of both bills. The tribes feel very strongly that negotiations should continue. Mr. Decker pointed out that the State of Wyoming has entered into litigation with the Wind River Tribes and has expended more than $7 million in litigation to negotiate water rights with one tribe. Montana should note that reserved water rights are an important issue to the tribes, and the extension is warranted. With regard to Senator Eck's bill, Mr. Decker stated the Confederated Tribes favor entering a compact into a preliminary decree for informational purposes without alteration. The tribes are also in favor of a six-month filing after negotiations have been terminated, as the tribes have many streams they would have to file on, and the Chief Water Judge did not feel a general water filing would be acceptable. With regard to SB 69, there was some concern with the deadline date for beginning compact negotiations. Mr. Decker stated he cannot speak on behalf of the Blackfeet Tribe that is not in negotiations, but gave a short history of the Confederated Tribes' withdrawal and then return to the negotiation table. Mr. Decker felt a provision such as this would prevent their return to the negotiation table. He also felt the committee should note the costs are great if you cannot negotiate and you are forced into litigation. (See witness sheet attached as Exhibit 7.) Representative Roland Kennerly appeared and stated he is a member of the Blackfeet Tribal Business Council. He stated they could live with SB 28. The Blackfeet are very interested in water, being one of the reservations that have the headwaters. The only thing they take exception to is the commission wants to set a deadline on their negotiations. The Blackfeet elected a new council in July. Out of the nine-man council, eight were new members. Although the council is going in the direction of negotiating, it is leary of doing so right now. They object to the amendments in the bill of setting a deadline for them. If they are threatened with a deadline, Representative Kennerly feels the council may be unwilling to negotiate. (See additional written testimony submitted to the committee by Louis Clayborn, Coordinator of Indian Affairs for the State of Montana, attached as Exhibit 8. Mr. Clayborn did not testify orally before the committee.)

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked that someone from the commission explain why they have trouble with the "informational purposes" and "without alteration" phrases. Marcia Rundle, staff attorney for the Compact Commission, stated there was some discussion in the

commission and with the commission's special counsel regarding that language, and the concerns at that time were due process issues. There was some discussion about whether that would raise potential constitutional problems. The commission has not met since that time, and they are at this time interested in discussing this issue with the full commission. Senator Towe questioned whether she was suggesting that in the subsection 3 language that she is proposing, which is a different type of information required, that one of the answers that would be made would be the authority for this particular claim for the compact that has been negotiated by the parties. Ms. Rundle thinks that was the intent. Senator Towe questioned whether by saying that, we do not really need the language "for informational purposes." Ms. Rundle believes they do not have strong objection to the language. Senator Towe questioned whether in her research she found any problems. Ms. Rundle stated the reason there is a problem in taking a strong position is they are on the cutting edge. She can find no authority where constitutional questions have been answered. Her research suggests the states can bind the citizens to the terms of a compact. Senator Towe then addressed a question to Mr. Decker and asked that he address the same question regarding "for informational purposes" and "without alteration." Mr. Decker personally saw no problem with binding the citizens by statute to a compact. He does not think the language would be objectionable. Senator Pinsoneault addressed a question to Representative Kennerly as to what was presently the membership of the tribal council. Representative Kennerly responded nine members, eight of whom were recently replaced, as they have elections every two years. Senator Pinsoneault questioned how many members of the council would have to agree to enter into negotiations. Representative Kennerly stated two-thirds, or six. Senator Yellowtail addressed a question to Mr. Decker. He stated Mr. Decker referred to the matter of a deadline that is being suggested in SB 69. He is interested in the matter of Mr. Decker's observation that this could preclude a tribe from terminating negotiations and then deciding to re-enter negotiations. Senator Yellowtail questioned whether Mr. Decker thought it would be adequate to back that deadline up six months or whether it would be necessary to have a deadline at all. Mr. Decker stated the earlier bill did not have that date at all and does not know why it is necessary. Mr. Decker thinks it is necessary to extend that date, as the language limits the alternatives available. He further believes the deadline is more harmful than helpful. Senator Yellowtail asked whether Mr. Decker had a specific date he would suggested as a compromise to back the deadline back a ways. Mr. Decker stated that since the extension for the bill is two years, a 12-month extension might be more appropriate than six months. Senator Mazurek stated the commission's concern was they have been going since July 1, 1979, and the rationale for the deadline is they have to get these done, so they fit into the adjudiciation process. He asked whether the tribes opposed any deadline at all or would a compromise of

July 1, 1986, be acceptable. Mr. Decker stated he thinks a compromise as far as a deadline date may be helpful, although he believes a deadline may cause litigation. Senator Towe addressed a question to Mr. Decker about the language in SB 69 at the end about retracting the termination. He doesn't see a deadline as to when you can retract. Senator Towe asked for Mr. Decker's comments about this language. Mr. Decker again stated that is a pretty short time frame. Senator Towe stated it was intended that the retraction would put you back into negotiations. It doesn't say when one must file the retraction notice. Senator Towe questioned whether there were any intent on the part of the commission that this language exclude the notice by limiting it to a particular time. Senator Mazurek stated that during the 30-day period, a retraction could be filed and void the effect of the notice of termination. Senator Towe asked Mr. Decker if that were any consolation and if it helped in accepting a deadline on negotiations. Mr. Decker stated he believed whatever feelings caused the termination would be hard to overturn in that short a period of time. Senator Towe asked what the effect of that would be stating the water adjudication process had to continue on non-Indian lands. While that is continuing, if the deadline were not extended, were we not in effect postponing the adjudication of everyone else's water rights. Mr. Decker stated that from the tribes' point of view, that may be a reasonable period of time. However, without the extension, they would have to be in litigation with the State of Montana. Senator Galt felt that since SB 76, this would be to the advantage of the Indian tribes, and it would probably be legalizing the negotiations that are going on right now.

CLOSING STATEMENT: Senator Eck stated she wanted to recognize the committee still has a lot of work ahead of it. The commission should be commended for making some significant efforts of getting the tribes back into the process, and the tribes need to be commended for accepting that. She recognizes that we are on the cutting edge in the whole matter of water law here. In discussing the process of litigation versus negotiation and mediation, if we are successful, it will save the State of Montana a lot of dollars.

Hearing on SB 28 and SB 69 was closed.

CONSIDERATION OF SB 56: Senator Christiaens, sponsor of SB 56, stated this is a bill that would establish assumption of risk as an absolute defense. He explained that the two principal defenses for common law negligence actions are assumption of risk and contributory negligence. The term, assumption of risk, is often used in two different senses. one of which is its principal meaning and the other, its secondary, which is equivalent to contributory negligence.

PROPONENTS: Bob Emmons, an attorney from Great Falls, appearing on his own behalf, appeared in support of SB 56. Mr. Emmons stated he represents several large insurance companys in his practice and is an active litigant, having appeared before the Supreme Court of Montana quite often. Mr. Emmons explained the three primary defenses in any lawsuit: assumption of risk, contributory negligence, and the fellow servant rule. He stated that Montana by rule has always had assumption of risk, although it has not been defined. However, negligence has been defined under our statutes. With the definition of contributory negligence, there has always been a distinction between contributory negligence and assumption of risk. Contributory negligence is based on what we call the objective standard of the reasonable man. Assumption of risk is a subjective standard which does not relate to proximate cause. Assumption of risk and contributory negligence are not the same--they are like talking about apples and oranges. Mr. Emmons explained you cannot assert assumption of risk as a defense. He then referred to the Kopischke and Abernathy Supreme Court decisions wherein the court stated comparative negligence applied assumption of risk as a defense. Mr. Emmons stated the Montana Jury Instruction Guide (hereinafter referred to as MJIG) contains an instruction regarding assumption of risk which states if the party has knowledge or should know it is implied, but the bill says a person must have actual knowledge of the dangerous condition. Mr. Emmons felt it was time the legislature define by statute assumption of risk and not allow the Supreme Court to say that because comparative negligence is in, they have taken away implied assumption of risk. Mr. Emmons explained they have not taken away express assumption of risk. Contributory negligence requires proximate cause and an objective standard. Assumption of risk is a subjective standard. Since Rule 8 of the Montana Rules of Civil Procedure and the Workers' Compensation Act discuss assumption of risk, Mr. Emmons feels the legislature should define it. (See witness sheet and written testimony attached as Exhibit 9.) Bob James, a lawyer from Great Falls and a lobbyist for State Farm, appeared in support of SB 56 and proposed the following amendments to clarify this bill:

1. Page 1, line 17.
Following: "knowledge"
Insert: "or should have had knowledge"

2. Page 1, line 17.
Following: "condition"
Insert: "creating the risk"

3. Page 1, line 23.
Following: "prior to"
Strike: "October 1, 1985"
Insert: "passage and approval of this bill"

Mr. James felt the amendments would bring the bill in line with the MJIG. He felt the problem is there is no definition of express assumption of risk. If we change it like the MJIG, actual or implied, that will be consistent with the Montana law prior to Abernathy. (See witness sheet attached as Exhibit 10.) Glen Drake appeared on behalf of the American Insurance Association in support of SB 56. He stated that in 1975 he spoke on the Senate floor on behalf of the comparative negligence bill that did away with the old law on contributory negligence. He did not speak in favor of anything that did away with assumption of risk. Mr. Drake suggests that no one in the Senate realized that voting on that law was doing away with assumption of risk. He explained there were seven states, including Montana, in which the courts have determined that the defense, assumption of risk, has been merged into the comparative negligence statute. There are six that have determined they are not so merged. Utah has by statute prohibited courts from applying comparative negligence principles in assumption of risk situations. Mr. Drake feels the legislature deserves to look at the issue. (See witness sheet attached as Exhibit 11.) Mike Young, general counsel for the Montana Department of Administration, stated the department supports the bill because they have to defend and pay all damage claims against the state; they feel they would find it helpful in their highway cases, as this is the type of defense you use in those circumstances when people think they can drive anytime, anywhere, anyplace, not taking into account the condition of the highways.

OPPONENTS: Tom Lewis, an attorney from Great Falls and a member of the Board of Directors of the Montana Trial Lawyers Association, appeared in opposition to SB 56 on behalf of the law firm of Regnier, Lewis & Boland, P.C. Mr. Lewis believes the court effectively merged the doctrine of implied assumption of risk into the system in the Kopischke case. Mr. Lewis believes the contributory negligence law was intended to eliminate the situation where the full burden of injury is placed on the injured person even though he was not entirely at fault. He believes the problem with applying these two defenses is that they overlap. The Kopischke and Abernathy decisions indicate the defenses should be treated as one defense under the comparative negligence law. Mr. Lewis believes assumption of risk has been abolished in more than half the states in the country before comparative negligence came into effect. (See witness sheet and additional written testimony attached as Exhibit 12.) Carl Englund, an attorney from Missoula and a lobbyist for the Montana Trial Lawyers Association, appeared in opposition to SB 56. Mr. Englund believes our system of negligence now stands so that the jury compares the actions of one side against the actions of the other side. Assumption of risk has only been abolished as far as it prevents any recovery on the part of the plaintiff. It is treated like any other negligence action, and the actions of the plaintiff are compared to the actions of the defendant. When we have this comparative negligence statute, all we do is compare.

QUESTIONS FROM THE COMMITTEE: Senator Towe asked Mr. Emmons to respond to the contention that in fact we are not talking about comparative negligence but instead comparative fault. Mr. Emmons referred to the Abernathy case where the Montana Supreme Court did not totally abolish assumption of risk, but instead that portion that is implied assumption of risk. He emphasized that we are not talking about comparative fault, but comparative negligence. Express assumption of risk is not negligence. It is basically contractual. Assumption of risk says you are willing to take the chance. Comparative negligence is based on the objective standard of the reasonable man. Senator Towe asked about the fact that when you are assuming the risk, you are really assuming the test of whether a reasonable man should assume that risk. Mr. Emmons stated it is the assumption of the individual who must know and realize it. Senator Towe felt we should consider what is fair to the parties. He believes the Supreme Court is in effect coming down and saying this not only avoids confusion, but because it is fair to go ahead and apply it this way. Mr. Emmons responded that he is concerned that the Supreme Court is legislating it and believes we should have the legislature define assumption of risk to point out to the Montana Supreme Court that is a viable defense. Senator Crippen asked the Montana Trial Lawyers Association to comment on the subjective versus the objective standard. Mr. Lewis stated there is a distinction between the subjective and objective standard. He believes the bill causes problems, because when you treat this as a subjective test, the question of fault doesn't even enter in. The problem with the subjective test is it doesn't matter whether it is reasonable or not. Senator Towe asked Mr. Emmons what would happen if you had two conflicting assumptions of risk. Mr. Emmons stated you resolve that by leaving it up to the jury. Senator Towe questioned whether this bill would eliminate comparative negligence in any form. Mr. Emmons responded affirmatively, believing they are not the same thing. Senator Towe suggested the committee address the question of what's best, not how it evolved.

CLOSING STATEMENT: Senator Christiaens stated the issue comes down to one question: Whether or not assumption of risk should remain a viable defense.

Hearing on SB 56 was closed.

There being no further business to come before the committee, the meeting was adjourned at 12:05 p.m.

Chairman

ROLL CALL

SENATE JUDICIARY COMMITTEE

49th LEGISLATIVE SESSION -- 1985 Date 01/14/85

NAME	PRESENT	ABSENT	EXCUSED
Senator Chet Blaylock	X		
Senator Bob Brown	X		
Senator Bruce D. Crippen	X		
Senator Jack Galt	X		
Senator R. J. "Dick" Pinsoneault	X		
Senator James Shaw	X		
Senator Thomas E. Towe	X		
Senator William P. Yellowtail, Jr.	X		
Vice Chairman Senator M. K. "Kermit" Daniels	X		
Chairman Senator Joe Mazurek	X		

DATE January 14, 1985

COMMITTEE ON Judiciary

Senate Bills 28, 56, and 69

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppose
BOB JAMES	STATE FARM	56	✓	
KARL ENGLUND	MT. TRIAL LAWYERS	56		✓
John McDonald	~~Flat Creek~~ Granite Co. Water Users	28		
Tom L Lewis	Regnier, Lewis & Bolland Attorneys	56		✓
R. J. EMMONS	EMMONS ICUSER	56	✓	
CLAY SMITH	AG	28		✓
TOM HOOK	MONTANA ASS. OF COUNTIES	28	information	
BILL ASHER	AGRICULTURAL PRESERVATION ASSN.	69	X	
RH Ellis	Mont. Water Development Assn.	28 69	✓	
Daniel Decker	~~Confederated Salish and~~ Kootenai Tribes	28 69	X	
Jim REGNIER	REGNIER & LEWIS	56		✓
Linda Hackman	MT. Water Courts	28 69	X	
K. M. Kelly	Int. Water Rights Assn.	28 69	✓	
J. Roy Holman	Mt. Wm System	56.56		
Scott Brown	State of Mont	SB69		
Marcia Rundle	" " "	SB69		
Glen Drake	American Rec Assn	SB-56	✓	
Harlan Gray	MPCo		—	
Jo Brunner	W. F.E.			
Geo. Ochenski	M.E.I.C.	69/56	✓	
Leo Roland Kennedy	Blackfeet Tribe	28/69	—	—

(Please leave prepared statement with Secretary)

Proposed Amendments to SB 28

1. Title, lines 7 and 8
   Following: "COMMISSION;" on line 7
   Strike: "PROVIDING" through "NECESSARY" on line 8
   Insert: "ELIMINATING THE REQUIREMENT OF CONGRESSIONAL APPROVAL OF A COMPACT"

2. Page 3, line 19
   Following: "agency"
   Strike: remainder of line 19 through "congress" on line 20

3. Page 4, line 14
   Following: "decree"
   Strike: "without alteration"

4. Page 6, line 15
   Following: "Montana"
   Strike: ","
   Insert: "and"

5. Page 6, line 16
   Following: "body"
   Strike: ", and" through "authority" on line 17

6. Page 6, line 19
   Following: "tribe"
   Strike: "or federal agency"

7. Page 6, line 24
   Following: "tribe"
   Strike: "or federal agency"

8. Page 6, line 25
   Following: "all"
   Strike: "federal and"

AMEND/hm/SB 28

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 1
DATE 011485
BILL NO. SB 28

(5) Members appointed to the commission shall serve until the work of the commission is completed or until they resign or are otherwise unable to serve. A vacancy must be filled in the manner of the original appointment.

History: En. Sec. 27, Ch. 697, L. 1979.

Cross-References

General powers and duties, 85-2-701.

2-15-213. Flathead basin commission — membership — compensation. (1) There is a Flathead basin commission.

(2) The commission consists of 15 members selected as follows:

(a) four members appointed by the governor from industrial, environmental, and other groups affected by Title 75, chapter 7, part 3, one of whom must be on the governor's staff and who also serves as the executive director;

(b) one member who shall be the commissioner of state lands or his designee;

(c) one member appointed by the Flathead County commissioners;

(d) one member appointed by the Lake County commissioners;

(e) one member appointed by the Confederated Salish and Kootenai Tribes;

(f) one member appointed by the United States department of agriculture, forest service regional forester for the northern region;

(g) one member appointed by the United States department of interior national park service, regional director for the Rocky Mountain region;

(h) five ex officio members appointed respectively by the chief executive of the provincial government of the Province of British Columbia, the regional administratior of the United States environmental protection agency, the administrator of the Bonneville Power Administration, the chief of engineers of the United States army corps of engineers, and the holder of a license issued for the Flathead project under the Federal Power Act.

(3) The commissioners shall serve without pay. Commissioners mentioned in subsection (2)(a), except the commissioner on the governor's staff, are entitled to reimbursement for travel, meals, and lodging while engaged in commission business, as provided in 2-18-501 through 2-18-503.

(4) The commission is attached to the governor's office for administrative purposes only.

History: En. Sec. 4, Ch. 424, L. 1983.

2-15-214. Flathead basin commission — term of appointment — quorum — vacancy — chairman — vote. (1) The commission members shall serve staggered 4-year terms.

(2) A majority of the membership, other than ex officio members, constitutes a quorum of the commission.

(3) A vacancy on the commission must be filled in the same manner as regular appointments, and the member so appointed shall serve for the unexpired term to which he is appointed.

(4) The commission shall select a chairman from among its members. The chairman may make motions and vote.

(5) A favorable vote of at least a majority of all members, except ex officio members, of the commission is required to adopt any resolution, motion, or other decision of the commission.

History: En. Sec. 5, Ch. 424, L. 1983.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 011485
BILL NO. SB 28

Budget responsibilities of Governor-elect, 17-7-121.

Energy supply emergency powers, Title 90, ch. 4, part 3.

2-15-202. Repealed. Sec. 32, Ch. 184, L. 1979.

History: En. Sec. 372, Pol. C. 1895; re-en. Sec. 147, Rev. C. 1907; re-en. Sec. 126, R.C.M. 1921; Cal. Pol. C. Sec. 382; re-en. Sec. 126, R.C.M. 1935; R.C.M. 1947, 82-1303.

2-15-203 through 2-15-210 reserved.

2-15-211. Mental disabilities board of visitors — composition — allocation. (1) The governor shall appoint a mental disabilities board of visitors.

(2) The board shall consist of five persons representing but not limited to consumers, doctors of medicine, and the behavioral sciences, at least three of whom may not be professional persons and at least one of whom shall be a representative of an organization concerned with the care and welfare of the mentally ill and one representative of an organization concerned with the care and welfare of the mentally retarded or developmentally disabled. No one may be a member of the board who is a full-time agent or employee of the department of institutions or a mental health facility affected by Title 53, chapter 20, part 1, and chapter 21, part 1, except this prohibition does not affect any employee of a state college or university.

(3) The mental disabilities board of visitors shall be attached to the governor for administrative purposes. It may employ staff for the purpose of carrying out its duties as set out in Title 53, chapter 20, part 1, and chapter 21, part 1.

History: Ap. p. Sec. 30, Ch. 466, L. 1975; amd. Sec. 16, Ch. 546, L. 1977; Sec. 38-1330, R.C.M. 1947; Ap. p. Sec. 32, Ch. 468, L. 1975; amd. Sec. 18, Ch. 546, L. 1977; Sec. 38-1232, R.C.M. 1947; R.C.M. 1947, 38-1232(part), 38-1330(part).

Cross-References

Mental Disabilities Board of Visitors — generally, Title 53, ch. 20, part 1.

Powers and duties, 53-20-104.

2-15-212. Reserved water rights compact commission. (1) There is created a reserved water rights compact commission.

(2) Commissioners are appointed within 30 days of May 11, 1979, as follows:

(a) two members of the house of representatives appointed by the speaker, each from a different political party;

(b) two members of the senate appointed by the president, each from a different political party;

(c) four members designated by the governor; and

(d) one member designated by the attorney general.

(3) Legislative members of the commission are entitled to receive compensation and expenses as provided in 5-2-301 for each day actually spent on commission business. Other members are entitled to salary and expenses as state employees.

(4) The commission is attached to the governor's office for administrative purposes only. The costs of the commission shall be paid from funds appropriated for that purpose from the water right adjudication account established in 85-2-241.

Montana Legislative Council
State Capitol
Helena, MT. 59620
(406) 444-3064

November 20, 1984

Judge W. W. Lessley
Chief Judge
Montana Water Courts
Box 879
Bozeman MT 59715

Dear Judge Lessley:

This is to confirm our telephone conversation of November 7, 1984, during which we discussed your reaction to LC 37, the Select Committee on Indian Affairs' proposed bill concerning the Reserved Water Rights Compact Commission.

In our conversation you stated that you were not opposed to the following:

(1) a two-year extension of the Compact Commission;

(2) an extension of the filing period for water claims unresolved by the Compact Commission from 60 days after the expiration of the Commission to six months after its expiration;

(3) addition to Section 85-2-231(3), MCA, of a statement that the terms of a negotiated compact are included in the preliminary decree "for informational purposes";

(4) insertion in Section 85-2-234, MCA, of the sentence, "The terms of a compact negotiated and ratified under 85-2-702 must be included in the final decree without alteration.";

(5) removal of the requirement of Congressional approval of compacts and providing instead for federal approval of compacts only if legally necessary.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 01/4/85
BILL NO. SB 28

Further, you recommended that the Indian Affairs Committee consider including in their bill a provision requiring the Compact Commission to make periodic progress reports to the water courts.

Thank you for your assistance in this matter.

Sincerely,

Brenda C Desmond

Brenda C. Desmond
Staff Attorney

BCD:ee
cc: Select Committee on Indian Affairs

BREND3/ee/Judge Lessley

MONTANA WATER COURTS

STATE OF MONTANA

WATER JUDGES:

Upper Missouri River Basin
Chief Judge W. W. Lessley
P.O. Box 879
Bozeman, MT 59715

Lower Missouri River Basin
Judge Bernard W. Thomas
P.O. Box 938
Chinook, MT 59523

Clark Fork River Basin
Judge Robert M. Holter
Lincoln County Courthouse
Libby, MT 59923

Yellowstone River Basin
Judge Roy C. Rodeghiero
P.O. Box 448
Roundup, MT 59072

December 3, 1984

Brenda Desmond
Staff Attorney
Montana Legislative Council
State Capitol
Helena, MT 59620

Dear Brenda:

Thank you for your confirming letter of November 20th.

Yours truly,

W.W. Lessley
Chief Water Judge

WWL/jl

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SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 01/14/85
BILL NO. SB 28

". . . to expedite and facilitate the adjudication of existing water rights."
CH. 697 L. 1979

AMENDMENTS TO SB 69

1. The Title is amended to read:

A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THE MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION TO SUBMIT PROGRESS REPORTS TO THE CHIEF WATER JUDGE; EXTENDING THE DEADLINE TO NEGOTIATE COMPACTS WITH INDIAN TRIBES AND FEDERAL AGENCIES; CONTINUING THE SUSPENSION OF WATER COURTS ADJUDICATION OF CLAIMS FOR WATER BY INDAIN TRIBES AND FEDERAL AGENCIES NEGOTIATING WITH THE MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION; PROVIDING ALTERNATE STATEMENTS OF CLAIM FOR FEDERAL RESERVED WATER RIGHTS NOT YET IN USE; PROVIDING AN ALTERNATE METHOD OF IDENTIFYING FEDERAL RESERVED WATER RIGHTS AND ENTERING THEM INTO THE FINAL DECREE; AMENDING SECTIONS 85-2-217 , 85-2-224, 85-2-234, 85-2-702, AND 85-2-704, MCA; AND PROVIDING AN EFFECTIVE DATE."

2. Section 4. Section 85-2-704, MCA, is amended to read:

page 4, lines 17-18-19

"... The tribe or federal agency shall file all of its claims for reserved rights within ~~60-days~~ 6 months of the termination of negotiations."

This amendment is offered to make this section consistent with the amendments to 85-2-702(3) in SB 28.

SENATE JUDICIARY COMMITTEE
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DATE 011485
BILL NO. SB 69

3. Section 85-2-224, MCA, is amended to read:

"85-2-224. Statement of claim. (1) The statement of claim for each right arising under the laws of the State and for each right reserved under the laws of the United States which has been actually put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water and times of use claimed;

(d) the legal description, with reasonable certainty, of the point or points of diversion and places of use of waters;

(e) the purpose of use, including, if for irrigation, the number of acres irrigated;

(f) the approximate dates of first putting water to beneficial use for the various amounts and times claimed in subsection (c); and

(g) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief.

(2) ~~The~~ Any claimant filing a statement of claim under section (1) shall submit maps, plats, aerial photographs, decrees, or pertinent portions thereof, or other evidence in support of his claim. All mpas, plats, or aerial photographs should show as nearly as possible to scale the point of diversion, place of use, place of storage, and other pertinent conveyance facilities.

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(3) Any statement of claim for rights reserved under the laws of the United States which have not yet been put to use shall include substantially the following:

(a) the name and mailing address of the claimant;

(b) the name of the watercourse or water source from which the right to divert or make use of water is claimed, if available;

(c) the quantities of water claimed;

(d) the priority date claimed;

(e) the laws of the United States on which the claim is based; and

(f) the sworn statement that the claim set forth is true and correct to the best of claimant's knowledge and belief."

4. Section 85-2-234, MCA, is amended to read:

"85-2-234. Final decree. (1) The water judge shall, on the basis of the preliminary decree and on the basis of any hearing that may have been held, enter a final decree affirming or modifying the preliminary decree. If no request for a hearing is filed within the time allowed, the preliminary decree automatically becomes final, and the water judge shall enter it as the final decree.

(2) The terms of a compact negotiated and ratified under 85-2-702 shall be included in the final decree.

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~~(2)~~ (3) The final decree shall establish the existing rights and priorities within the water judge's jurisdiction of persons required by 85-2-221 to file a claim for an existing right, and of persons required to file a declaration of existing rights in the Powder River Basin pursuant to an order of the department or a district court issued under sections 8 and 9 of Chapter 452, Laws of 1973, and of any federal agency or Indian tribe, possessing water rights arising under federal law, required by 85-2-702 to file claims.

~~(3)~~ (4) The final decree shall state the findings of fact, along with any conclusions of law, upon which the existing rights and priorities of each person, federal agency, and Indian tribe named in the decree are based.

~~(4)~~ (5) For each person who is found to have an existing right arising under the laws of the State of Montana, the final decree shall state:

(a) the name and post-office address of the owner of the right;

(b) the amount of water, rate, and volume, included in the right;

(c) the date of priority of the right;

(d) the purpose for which the water included in the right is used;

(e) the place of use and a description of the land, if any, to which the right is appurtenant;

(f) the source of the water included in the right;

(g) the place and means of diversion;

(h) the inclusive dates during which the water is used each year;

(i) any other information necessary to fully define the nature and extent of the right.

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(6) For each person, or tribe, or federal agency possessing water rights arising under the laws of the United States, the final decree shall state:

(a) The name and mailing address of the holder of the right;

(b) the source or sources of water included in the right;

(c) the quantity of water included in the right;

(d) the date of priority of the right;

(e) the purpose for which the water included in the right is currently used, if at all;

(f) the place of use and a description of the land, if any, to which the right is appurtenant;

(g) the place and means of diversion, if any;

(h) any other information necessary to fully define the nature and extent of the right, including the terms of any compacts negotiated and ratified under 85-2-702."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 4
DATE 011485
BILL NO. SB 69

(This sheet to be used by those testifying on a bill.)

NAME: K.M. Kelly DATE: _____

ADDRESS: 4605 Glass Dr. Helena

PHONE: 458-5861

REPRESENTING WHOM? Mont. Water Development Assn.

APPEARING ON WHICH PROPOSAL: Sen Bill 28 and 69

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

Our assn. supports the concept of extending the Reserved Rights Commission

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 5
DATE 011485
BILL NO. SB 28 & SB 69

(This sheet to be used by those testifying on a bill.)

NAME: Linda Hickman DATE: 1/24/85

ADDRESS: Box 879 Bozeman Mt.

PHONE: 586-4364

REPRESENTING WHOM? Montana Water Courts

APPEARING ON WHICH PROPOSAL: 28 + 69

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENT: would like to see provision for periodic progress Reports by the Compact Commission to the Water Court.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 6
DATE 011485
BILL NO. SB 28 + SB 69

(This sheet to be used by those testifying on a bill.)

NAME: Daniel Decker DATE: 1-14-85

ADDRESS: P.O. Box 278 ; Pablo, Mont 59855

PHONE: (406) 726-3183

Tribal Atty

REPRESENTING WHOM? Confederated Salish and Kootenai Tribes

APPEARING ON WHICH PROPOSAL: SB 28 & 69

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 011485
BILL NO. SB 28 & SB 69

Fort Belknap Community Council

(406) 353-2205
P.O. Box 249
Fort Belknap Agency
Harlem, Montana 59526

Fort Belknap Indian Community
(Tribal Govt.)
Fort Belknap Indian Community
(Elected to administer the affairs of the comm and to represent the Assiniboine and the Ventre Tribes of the Fort Belknap Reservation)

1-9-85
DATE

SENATE BILL - 69 - MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION

The Fort Belknap Indian Community Supports Senate Bill 69.

For the Committees information, we have been conducting informal discussions with the Montana Reserved Water Rights Compact Commission.

Our primary concern is for the Montana State Legislature to express their concept to the Tribes as to the roles, responsibilities, duties and authority of this Commission. Prior to any formal actions, we must know who we are dealing with and so far as we can determine, the State Legislature must act through one Committee.

The impact of water to the State and the Tribes is such that all avenues should remain open for use by both parties.

The length of the extension is questionable, however, other factors must be considered as the decisions we are about to make are too important to deal with lightly.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 8
DATE 011485
BILL NO. SB 69

(This sheet to be used by those testifying on a bill.)

NAME: EMMONS, R DATE: 1-14-85

ADDRESS: 608 STATE BLDG, Great Falls

PHONE: 406-761-7150

REPRESENTING WHOM? R. J. Emmons, Attorney

APPEARING ON WHICH PROPOSAL: S.B. 56

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 011485
BILL NO. SB 56

THE MONTANA JURY INSTRUCTION GUIDE (MJIG) defines contributory negligence and provides that any contributory negligence of the claimant bars recovery.E.G., a plaintiff who was 10% negligent is barred from any recovery.(MJIG 11.00)

MJIG has always defined assumption of risk by No.1310. It defines the elements. It refers to actual or implied knowledge.

In 1975, MONTANA enacted comparative negligence by Ch.60,1975,now Sec. 27-1-702,MCA: "CONTRIBUTORY NEGLIGENCE SHALL NOT BAR RECOVERY IN AN ACTION BY ANY PERSON OR HIS LEGAL REPRESENTATIVE TO RECOVER DAMAGES FOR NEGLIGENCE RESULTING IN DEATH OR INJURY TO PERSON OR PROPERTY IF SUCH NEGLIGENCE WAS NOT GREATER THAN THE NEGLIGENCE OF THE PERSON AGAINST WHOM RECOVERY IS SOUGHT, BUT ANY DAMAGES ALLOWED SHALL BE DIMINISHED IN THE PROPORTION TO THE AMOUNT OF NEGLIGENCE ATTRIBUTABLE TO THE PERSON RECOVERING."

COMMENT: All references are to NEGLIGENCE. There is no mention of assumption of risk.

NELGIGENCE IS BASED ON THE ACTIONS OF A REASONABLY PRUDENT PERSON. THE STANDARD IS UNIVERSAL OR OBJECTIVE, THE COMMUNITY.

ASSUMPTION OF RISK IS SUBJECTIVE. IT IS BASED ON THE INDIVIDUAL.IT IS NOT THE REASONAB LE MAN TEST. IT IS BASED THE THE PERSON HAVING KNOWLEDGE OF THE PARTICULAR CONDITION, ACTUAL OR IMPLIED;APPRECIATED THE CONDITION AS DANGEROUS; VOLUNTARY REMAINING OR CONTINUING IN THE FACE OF THE KNOWN DANGEROUS CONDITION; AND INJURY RESULTING AS THE USUAL OR PROBABLE CONSEQUENCE OF THIS DANGEROUS CONDITION.(MJIG 13.0

THE 1975 AMENDMENT FOR CONTRIBUTORY NEGLIGENCE DOES NOT DEAL WITH ASSUMPTION OF RISK, EITHER DIRECTLY OR INDIRECTLY.
KOPISCHKE V. FIRST CONTINENTAL CORP.,601 P.2d 668(1980): "WE WILL FOLLOW THE MODERN TREND AND TREAT ASSUMPTION OF RISK LIKE ANY OTHER FORM OF CONTRIBUTORY NEGLIGENCE AND APPORTION IT UNDER THE COMPARATIVE NEGLIGENCE STATUTE."

ABERNATHY V. ELINE OIL FIELD SERVICES ,650 P2d 772, 39 St. Rep.1688 (1982): "WE THEREFORE HOLD THAT THE DOCTRINE OF IMPLIED ASSUMPTION OF RISK IS NO LONGER APPLICABLE IN MONTANA."
ABERNATHY: "IN THIS CASE, WE ARE NOT RULING UPON THE APPLICATIONOF THE DOCTRINE OF ASSUMPTION OF RISK IN PRODUCT LIABILITY CASES."

BROWN V. NORTH AMERICAN MFG. CO.,176 Mont.98, 576 P.2d.711(1978),a products liability case, farm machinery(Frank Morrison for plaintiff). Pages 110-111 are attached. "...IN THE PAST MONTANA CASES HAVE NOT BEEN CONSISTENT IN DISTINGUISHING BETWEEN THE SUBJECTIVE STANDARD REQUIRED IN THE DEFENSE OF ASSUMPTION OF RISK, AND THE OBJECTIVE STANDARD NECESSARY TO A CONTRIBUTORY NEGLIGENCE DEFENSE...."(pg.111)

IN KOPISCHKE, PAGE500 Mt.Rpr.,:"...WE AGREE WITH PLAINTIFF THAT THE DOCTRINE OF ASSUMPTION OF RISK DOES NOT APPLY IN THE INSTANT CASE." "...HERE, THERE IS NO EVIDENCE THAT PLAINTIFF KNEW OF THE PARTICULAR CONDITION WHICH CAUSED THE ACCIDENT."ASSUMPTION OF RISK IS GOVERNED BY THE SUBJECTIVE STANDARD OF THE PLAINTIFF RATHER THAN THE OBJECTIV STANDARD OF THE REASONABLE MAN."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 011485
BILL NO. SB 56

STATUTES RELATING TO CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK

RULE 8, M. R. CIV. P:"IN PLEADING TO A PRECEDING PLEADING, A PARTY SHALL SET FORTH AFFIRMATIVELY, ACCORD AND SATISFACTION, ARBITRATION AND AWARD, ASSUMPTION OF RISK, CONTRIBUTORY NEGLIGENCE...."

THE MONTANA RULES OF CIVIL PROCEDURE WERE ADOPTED IN 1961.Long prior to their adoption, the Montana courts recognized assumption of risk and contributory negligence as separate defenses.

SEC. 1-1-204(4),MCA(enacted in 1907), defines negligence:" 'Neglect', 'negligence', 'negligent', and 'negligently' denote a want of the attention to the nature orprobable consequences of the act or omission that a prudent man would ordinarily givie in acting in his own concerns."

9-71-609 MCA

THE WORKER'S COMPENSATION ACT, SEC. 92-201,RCM,1947(1915) provided that the employer could not assert as a defense to a claim by an injured employee: "(1)That the employee was negligent, unless such negligence was wilful;(2)That the injury was caused by the negligence of a fellow employee;(3)That the employee had assumed the risks inherent in, incident to, or arising out of his employment and maintain a reasonably safe place to work, or reasonably safe tools or appliances."

SEC. 69-14-1006, MCA(Ch.29, L.1911), regarding railroads provides in part: (2)"...the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such emplyee...(b)An employee of any such person or corporation so operating such railroad shall not be deemed to have assumed any risk incident to his employment where such risk arises by reason of the negligence of his employer or any person in the service of such employer."

COMMENT:But this does not exclude assumption of risk that does not arise from the two exclusions in the statute and are attributable solely to the employee assuming the risk.It recognizes the employee can assume the risk of a particular situation that arises during the course of his work.

CONTRIBUTORY NEGLIGENCE: Sec.58-607,RCM,1947(SEC.2296,Civ.C.1895): "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief."(Now Sec. 27-1-701,MCA, with only the last sentence deleted in MCA).

COMMENT: The claimant's lack of ordinary care is contributory negligence. The "wilfulness" indicates an assumption of risk.

JUDICIARY COMMITTEE
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ABERNATHY AND KOPISCHKE: THERE IS NO ASSUMPTION OF RISK IN A NEGLIGENC CASE. YET ONLY NEGLIGENCE WAS MODIFIED BY THE COMPARATIVE NEGLIGENCE STATUTE.

KOPISCHKE: IMPLIED ASSUMPTION OF RISK.

THE AMENDMENT WILL REINTRODUCE ASSUMPTION OF RISK. IT'S APPLICATION WILL BE DECIDED BY THE TRIAL JUDGE WHO WILL DETERMINE IF HE WILL INSTRUCT THE JURY ON ASSUMPTION OF RISK. THE JURY WILL DETERMINE IF ASSUMPTION OF RISK APPLIES. IF IT DOES, THEN THE PLAINTIFF IS BARRED FROM ANY RECOVERY.

THE COMPARATIVE NEGLIGENCE STATUTE WAS NOT INTENDED TO REPLACE ASSUMPTION OF RISK. IT WAS ONLY FOR NEGLIGENCE, BASED ON THE OBJECTIVE STANDARD OF THE REASONABLE MAN.

LOGICALLY, ASSUMPTION OF RISK SHOULD ALSO BE ABANDONED IN PRODUCTS LIALBILITY CASES SINCE IT IS STILL THE SAME STANDARD: SUBJECTIVE FOR THAT PERSON. IT IS AN ABSOLUTE BAR. WHY APPLY IT IN PRODUCTS CASES BUT NOT APPLY IT IN THE NEGLIGENCE FIELD.

IN PRODUCTS CASES, COMPARATIVE NEGLIGENCE DOES NOT APPLY. TO BE CONSISTENT, COMPARATIVE NEGLIGENCE DOES NOT BAR ASSUMPTION OF RISK.

IF A WORKMAN IS INJURED ON THE JOB AND HIS EMPLOYER DOE SNOT CARRY WORKER'S COMPENSATION INSURANCE, THE EMPLOYER CANNOT ASSERT ANY OF THE COMMON LAW DEFENSES,I.E,.CONTRIBUTORY NEGLIGENCE, ASSUMPTION OF RISK AND FELLOW SERVANT.SEC. 39-71-509 MCA,common law defenses are not applicable.

SEC. 1-3-206,MCA, MAXIMS OF JURISPRUDENCE:"HE WHO CONSENTS TO AN ACT IS NOT WRONGED BY IT."

SEC.1-3-208: "NO ONE CAN TAKE ADVANTAGE OF HIS OWN WRONG."

SEC. 1-3-215:"BETWEEN THOSE WHO ARE EQUALLY IN THE RIGHT OR EQUALLY IN THE WRONG, THE LAW DOES NOT INTERPOSE."

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 9
DATE 011485
BILL NO. SB 56

EXAMPLES OF ASSUMPTION OF RISK

AN OWNER OF A HORSE TELLS THE POTENTIAL RIDER THE HORSE IS UNMANAGEABLE AND BUCKS. THE PERSON STATES HE CAN RIDE THE HORSE.MOUNTS AND IS THROWN OFF. IS NOW A PARAPLEGIC. IN MONTANA: COMPARATIVE NEGLIGENCE APPLIES. THE PLAINTIFF CONTENDING THE OWNER SHOULD NOT HAVE EVEN SHOWN THE HORSE TO THE PLAINTIFF; THE DEFENDANT CONTENDING HE TOLD HIM THE RISKS AND YET HE RODE THE HORSE VOLUNTARILY. JURY ISSUE. IF COMPARATIVE NEGLIGENCE, 50-50 RECOVERY OF 2,000,000. ASSUMPTION OF RISK: NO RECOVERY AT ALL.

ASSUMPTION OF RISK STATES THAT A PERSON IS RESPONSIBLE FOR HIS OWN ACTS AND WHEN HE VOLUNTARILY ASSUMES A KNOWN DANGER, HE ALONE IS THE[3] PARTY AT RISK. NO ONE ELSE.

GOLF: ASSUME THE RISK OF BEING HIT BY AN ERRANT BALL HIT FROM ANOTHER FAIRWAY. NOW, UNDER ABERNATHY, THERE IS NO ASSUMPTION OF RISK. ONLY NELGIGENCE. YET YOU KNOW WHEN YOU ENTER A GOLF COURSE YOU CAN BE HIT BY A BALL FROM ANOTHER FAIRWAY. THE RULE WAS: IF YOU ARE STRUCK BY A BALL HIT BY A PLAYER PLAYING ON THE SAME HOLE AS YOU, THAT PLAYER IS LIABLE; IF HIT BY A PLAYER ON ANOTHER HOLE, NOT LIABLE. DEATH OF A PLAYER STRUCK BY A BALL ON THE GOLF COURSE.

SPORTS:
HORSE RACING"JOCKEYS-COMPARATIVE NEGLIGENCE; OR ASSUMPTION OF RISK.
RACE CAR DRIVING: CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.
TOLD A CAR IS DEFE CTIVE AND YET YOU DRIVE IT:ASSUMED THE RISK.NOT UNDER KOPISCHKE.

DRUCK-

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 7
DATE 011485
BILL NO. SB 56

(This sheet to be used by those testifying on a bill.)

NAME: BOB JAMES DATE: 1/14/85

ADDRESS: BOX 2885 GREAT FALLS

PHONE: 727-2311

REPRESENTING WHOM? STATE FARM

APPEARING ON WHICH PROPOSAL: SB 56

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 10
DATE 011485
BILL NO. SB 56

(This sheet to be used by those testifying on a bill.)

NAME: Glen Drake DATE: 1/14

ADDRESS: Helena

PHONE: 442-0230

REPRESENTING WHOM? Am Ins Assn

APPEARING ON WHICH PROPOSAL: SB-56

DO YOU: SUPPORT? ✓ AMEND? _____ OPPOSE? _____

COMMENT:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 11
DATE 011485
BILL NO. SB 56

(This sheet to be used by those testifying on a bill.)

NAME: Tom L Lewis DATE: 1-14-85

ADDRESS: P.O. Box 2325, Great Falls, 55403

PHONE: 761-5555

REPRESENTING WHOM? Regnier, Lewis + Boland, P.C.

APPEARING ON WHICH PROPOSAL: S.B. 56

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENT: written statement attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 12
DATE 011485
BILL NO. SB 56

OPPOSE

OUTLINE OF TESTIMONY BEFORE JUDICIARY COMMITTEE
(RE: SENATE BILL No. 56 --
ASSUMPTION OF THE RISK AS ABSOLUTE DEFENSE)

I. The Montana Comparative Negligence Statute found at §27-1-702 MCA was enacted in 1975 and permitted a person injured as a result of negligence or fault on the part of another to recover damages so long as the injured person was not more negligent than the defendant. The amount of damages recoverable were to be apportioned between the parties in accordance with the respective degree of fault attributable to each.

A. Example: Uncontrolled intersection where where there is an automobile collision and one driver is injured. If the injured person is 10% at fault and the other driver is 90% at fault, then the injured driver recovers 90% of his damages. If both drivers are equally at fault, then the injured person may recover 50% of the damages he or she can prove. If the injured person is more than 50% at fault, then he or she recovers nothing.

II. Senate Bill 56 violates the concept of apportionment of damages between negligent parties jointly responsible for one of the parties' injuries by making even one percent assumption of risk on the part of the injured party a complete bar to his or her recovery.

A. Take the same uncontrolled intersection example: The party on the right, who has the right-of-way, is traveling 2 miles per hour over the speed limit and enters the intersection at the same time the other party does, who fails to yield. The driver on the left who has the statutory duty to yield is traveling 15 miles per hour over the speed limit and fails to yield. The party with the right-of-way is seriously injured and rendered a paraplegic and permanently disabled.

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If Senate Bill 56 were enacted assumption of the risk could be a complete bar to recovery despite the fact that the non-yielding party may have been 95% negligent while the party who was injured and had the right-of-way was only 5% negligent attributable to his speeding at 2 miles per hour in excess of the speed limit. If it were determined that the injured person voluntarily exposed himself to the risk of injury by entering the intersection at 2 miles above the speed limit, the injured party would have no recovery whatsoever, despite the fact that the other driver was guilty of far more culpable misconduct and violated two statutes.

B. This result flies in the face of the comparative negligence doctrine, which was the result of many years of judicial and legislative progress away from the harsh result of requiring an injured person to bear the entire burden of the economic impact of his injuries just because he was one percent at fault in causing those injuries.

III. Senate Bill No. 56 as drafted would permit the defense of assumption of the risk and prohibit any recovery by a person who was injured because he or she rode as a passenger in an automobile on icy roads, something every Montanan has to do many times each year:

Assume the following:

A. A rancher gets into his pickup to go check on his calves or a construction worker gets into his vehicle to go to work knowing that he is going to have to drive on icy and dangerous roads. (A known dangerous condition)

B. A Montanan could not argue that he did not understand and appreciate the increased risk of having to drive on icy roads.

C. A Montanan could not argue very effectively that he did not voluntarily expose himself to the risk of the icy roads.

SENATE JUDICIARY COMMITTEE
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D. And if that rancher or construction worker was injured while going to work because the driver of an 18 wheeler loses control at 75 miles per hour on icy roads and collides with the vehicle which the rancher or construction worker was driving, there could be no recovery under this Bill because because the rancher or construction workers voluntarily assumed the risk of the icy condition despite the fact that doing so was an ordinary and necessary part of daily living in our state.

There could not be a worse result than this, because a person seriously injured under these circumstances would have to bear the full brunt and burden of the economic impact of serious injury while the reckless, wanton, willful misconduct of the driver of the 18 wheeler and his insurance carrier would go free of any adverse economic impact and would not have to pay any damages.

IV. The Montana Supreme Court, in the cases of Kopischke v. First Continential Corporation, 610 P.2d 668 (1980) and Abernathy v. Eline Oil Field Services, Inc., 650 P.2d 772 (1982), has correctly analyzed assumption of the risk in light of the Montana Comparative Negligence Statute and concluded quite properly that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of the risk into the general scheme of assessment of liability in porportion to fault -- which meant that each negligent party, including the injured plaintiff, would bear responsibility for their negligenct conduct in proportion to the amount of negligence attributable to each.

A. The Montana Court was not alone in reaching this result: Minnesota, Mississippi, Washington, California, Alaska and many others have all adopted the same position as the Montana Court and merged assumption of the risk into comparative negligence, as just another form of contributory fault.

B. The trend in virtually every state where comparative negligence has been adopted is to abolish assumption of the risk, because this approach avoids the harsh "all or nothing" affect of assumption of the risk while at the same time permitting a defendant to reduce the amount of his liability for damages when he can demonstrate that the plaintiff's fault contributed to his or her own injuries.