

## **MINUTES**

### **MONTANA SENATE 52nd LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON FISH & GAME**

**Call to Order:** By Bob Williams, on January 22, 1991, at 1:00 P.M.

#### **ROLL CALL**

**Members Present:**

Bob Williams, Chairman (D)  
Don Bianchi, Vice Chairman (D)  
John Jr. Anderson (R)  
Eve Franklin (D)  
Lorents Grosfield (R)  
Greg Jergeson (D)  
Dick Pinsoneault (D)  
David Rye (R)  
Paul Svrcek (D)

**Members Excused:** Senator Swift

**Staff Present:** Andrea Merrill (Legislative Council).

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

**Announcements/Discussion:** Chairman Williams called meeting to order. Roll was taken and noted.

Testimony on SB 13 will be discussed and Executive Action will be taken on Thursday, January 24, 1991.

#### **HEARING ON SB 97**

#### **Presentation and Opening Statement by Sponsor:**

Senator Tom Beck, Dist. 24, said this is an act to establish procedures for posting of private land along public roads requiring the Fish, Wildlife and Parks to enforce posting requirements. This Bill is the result of an Attorney General's Opinion which was asked for on the trespassing notices that were placed along county right-of-way. At times there was posting that made a public road appear to be a private road and the Attorney General's Opinion said that private property that is unfenced along public roadways may not be closed to public access by the use of orange markings placed on posts located where the road enters the private property. The bill will allow persons to

post that private land but they will have to place their sign back far enough to allow the public to know that the land is posted but the road is not.

Proponents' Testimony:

Gordon Morris, Executive Director of the Montana Association of Counties, testified. The Attorney General's Opinion came in July, 1988. See Exhibit No. 1. The counties did not have time to do anything in the 1989 Session and consequently did adopt a resolution at the June Convention 1990 that specifically requested legislation be sought to alleviate the problem that resulted from the posting provisions that were adopted by the Legislature in 1987. On Page 2, Exhibit No. 1, the AG's Opinion identifies the fact "that the immediate problem with posting is that orange paint on either side of an entry through a fence line typically indicates that all property beyond the markings is closed to access". That means that if a person traveling in an unfamiliar area sees the postings, either with surveyor tape or paint, it is not clear and unambiguous that the road is not itself private. He continues to say "that the landowner's intent here is clear. Unfortunately, the liberal posting requirements of revised criminal trespass statutes were not designed for application in the present situation."

This is a serious matter for counties from another perspective for after the 1987 Session, the Department of Highways began to measure roads relative to the federal gas tax Allocation. Gas tax allocation in the State of Montana is based on the number of miles of public roads in each county. As the bill is now written, when the Dept. of Highways came to the posting of private land, they would assume that all roadways past the posting was private and closed to public access. Therefore, there was a reduction in the number of miles they had in terms of the federal gas tax allocation. What the counties believe SB 97 will correct is to alleviate the problem so that property can be signed on either side of the road to be closed to public trespass and at the same time clearly indicate that the roadway itself is a public right-of-way. It is my opinion that SB 97 does accomplish this fact.

Lorna Frank. See Exhibit No. 2.

Robert VanDerVere, Helena, believes this is a good bill and a long-time coming. The Committee should consider that when a landowner posts his land near a public road he should sign it.

K.L. Cool, Director of Fish, Wildlife and Parks. See Exhibit 3.

Senator Grosfield, Dist. No. 41, believes this is a problem that needs to be addressed. He suggested some amendments that may the meaning. (The suggested amendments were given to Legislative Council, Andrea Merrill for her consideration.)

Opponents' Testimony:

No opponents testifying at this time.

Questions From Committee Members:

Senator Pinsoneault questioned Director Cool if he had a chance to look at Senator Grosfield's suggested amendments. Director Cool stated that the Department would accept all amendments except for the one where it would require the Department to provide specific signs.

Senator Bianchi questioned Senator Beck if a sign upon entering private property on an unfenced road and a sign when leaving the private property, would not be beneficial for the public. Senator Beck said that posting both ends of the private property would be helpful, but it appeared it would have to be posted going both directions. He also stated that the intent of the bill is that if someone is violating the trespass law the Department will enforce that provision.

Senator Pinsoneault questioned Senator Beck if it would not be the landowner's responsibility for placing the signs on their property. Senator Beck replied "Yes."

Senator Pinsoneault suggested that if the "NO TRESPASSING" signs were for an area of 6 miles or more that a "LEAVING POSTED AREA" sign would be helpful. Senator Beck commented that he would leave the posting language of the unfenced property requirement up to the Senate Fish and Game Committee. He did not want to burden the landowner any more than necessary.

Senator Grosfield questioned Senator Beck if this bill coordinates with one on a landowner who incorrectly posts public land. Senator Beck stated he was unfamiliar with the law and offered to let someone else address the question. Stan Bradshaw responded by advising that bill was HB 33 which intended to get at specific intentional abuse.

Senator Anderson commented that none of their land is posted nor do they intend to post. They follow the block management plan. The Fish and Game have been posting signs on the main access through the property and some problems are arising. Some people put locked gates on roads that were public access.

Senator Bianchi commented that for hunting and fishing laws the Department of Fish and Wildlife was responsible for trespass laws and for criminal trespass laws the county sheriff's department has responsibility. Will this new bill give the responsibility only to the Department, and if it does, why are we excluding the sheriff's department? Would it be better to have a joint function of both the Department and the sheriff's department to enforce the trespass laws of the State. Director Cool stated

that if the amendment that the department is requesting is approved by the Committee that the status quo would remain. The criminal trespass laws would continue to fall to the local county authorities. It would continue to be a shared responsibility.

Chairman Williams questioned Gordon Morris if he would approve of the amendments suggested by Senator Grosfield. Mr. Morris advised that SB 97 went through four legislative drafts. It became obvious to the drafters that there was little reason to argue fenced versus unfenced that if it is private property, fences are beside the point.

Chairman Williams commented that when considering this bill, it will be necessary to know who will be enforcing the law, how rigid they will be and have good communications between the Department and the people in the field who will be enforcing it so that it does not become a harassment but a future law that will be doing what it was intended.

Closing by Sponsor:

Senator Beck agreed that the terminology of the bill is important. This bill will address a problem.

Chairman Williams requested Andrea Merrill to peruse the amendments and report back to the Committee on Tuesday, January 29, 1991.

ADJOURNMENT

Adjournment At: 1:43P.M.

  
SEN. BOB WILLIAMS, Chairman

\_\_\_\_\_  
JULIA LEVENS, Secretary

BW/jl

HIGHWAYS - "No Trespassing" notice along unfenced private property lying adjacent to county road;  
TRESPASS - Use of "No Trespassing" notice on unfenced property lying adjacent to public road;  
MONTANA CODE ANNOTATED - Section 45-6-201.

HELD: Private property that is unfenced along public roadways may not be closed to public access through the use of orange markings placed on posts located where the road enters the private property.

13 July 1988

Wm. Nels Swandal  
Park County Attorney  
Park County Courthouse  
Livingston MT 59047

Dear Mr. Swandal:

You have asked my opinion on the following question:

May "No Trespassing" notices be placed within a county road right-of-way on the posts of a fenceline that lies perpendicular to the road and delineates private property that a landowner desires to close to public access?

Your opinion request evolved through the interaction of three groups: landowners who desire to post their property in compliance with the revised criminal no-trespassing statute, § 45-6-201, MCA; sportsmen who desire enhanced public access and claim the "No Trespassing" signs mislead the public; and Park County officials who seek to settle the dispute while protecting the integrity of the county road right-of-way.

The county roads in question are public rights-of-way that run through private property that is unfenced along the roadway. Occasionally the roadways cross a property line that divides two parcels held in separate ownership. On these property lines the landowners erect fences, often in conjunction with stock gates across the road surface. The fences separate one grazing field from another, but the county road that bisects the open pasture is otherwise unfenced along its route.

The owners of these pastures have adopted an easy method of posting their fields closed to trespassing. Upon the assumption that the point at which the public road crosses the fenceline and cattle gate is an access

point, the owners have painted orange the posts on either side of the gate. This assumption is based upon the revised criminal trespass statute, § 45-6-201, MCA. That statute provides that orange paint on fence posts may be used to give notice of no trespassing. The statute contains several requirements that must be met before property is considered closed. One such requirement is that each "normal point of access" must be posted with the proper amount of orange paint. Apparently, the landowners have attempted to convey to motorists that the property on either side of the road, following the orange marking, is closed to the public.

The immediate problem with this practice of posting is that orange paint on either side of an entry through a fenceline typically indicates that all property beyond the marking is closed to access. On similar facts the Montana Supreme Court recently upheld the criminal trespass conviction of a motorist who inadvertently drove down a road through a gate marked with orange paint. State v. Blalock, 45 St. Rptr. 1008, \_\_\_ P.2d \_\_\_ (1988). The landowners in your request are unable to convey through their orange marking that a motorist may cross the fenceline, enter the next field, stay on the roadway and not actually trespass. As the sportsmen's group has brought to your attention, this form of posting will likely mislead the public.

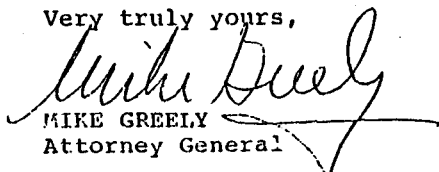
The landowners' intent here is clear. Unfortunately, the liberal posting requirements of the revised criminal trespass statute were not designed for application to the present situation. I doubt that the Legislature anticipated or contemplated the factual situation of an unfenced public right-of-way crossing fields that landowners wanted closed. The points of access for these fields actually run the entire length of the unfenced public road. The situation simply does not lend itself to easy and unambiguous posting.

Landowners who desire the result of effective posting without additional fence construction must therefore pursue alternatives to orange markings. One alternative would be to place a conspicuous sign on the roadway's edge upon entering the private property stating "Private Property, No Trespassing Next \_\_\_ Miles." Another alternative would be to place conventional "No Trespassing" signs at regular intervals along the private property bordering the road. In any case, the present practice of painting the posts adjoining the roadway at a fenceline is a misapplication of the notice provisions of section 45-6-201, MCA. The misapplication not only fails to legally close the adjacent property to trespassing but also inhibits the public's use and enjoyment of the road.

THEREFORE, IT IS MY OPINION:

Private property that is unfenced along public roadways may not be closed to public access through the use of orange markings placed on posts located where the road enters the private property.

Very truly yours,

  
MIKE GREELY  
Attorney General

MG/GS/gd  
42/96/2

SB 97  
January 22, 1991

SENATE FISH AND GAME  
EXHIBIT NO. 3  
DATE 1/22/91  
BILL NO. SB 97

Testimony presented by K. L. Cool, Dept. of Fish, Wildlife & Parks

This legislation provides specific requirements for the proper posting of private land through which the public has a legal right of way.

Our department supports the procedure embodied in SB 97 because these procedures provide a solution to a problem identified in a previous Attorney General's opinion.

The bill also provides that enforcement of Section 45-6-201 shall be accomplished by the Department of Fish, Wildlife & Parks.

Because our department currently has this authority and responsibility, we feel the added enforcement provision is redundant. The enforcement provision should not put our officers in the position of judging whether a road through private land is a public right of way or not. This responsibility currently is (and should be) vested in the County Attorney, who is empowered to make a determination of a road's status when deciding whether or not to prosecute for a trespass violation. The court then provides the final decision on the legal status of the road.

We therefore request that Senator Beck and this committee consider the attached amendment which would eliminate redundant and possibly confusing language.

AMENDMENT TO SB 97  
INTRODUCED (WHITE) COPY

1. Page 3, lines 17 and 18

Strike: "The department shall enforce the posting provisions set out in subsections (2) and (3)."





**MONTANA FARM BUREAU FEDERATION**

502 South 19th • Bozeman, Montana 59715  
Phone: (406) 587-3153

EXHIBIT NO. 2

DATE 1/22/91

SB97

BILL # SB-97 ; TESTIMONY BY: Lorna Frank  
DATE Jan. 22, 1991 ; SUPPORT Yes ; OPPOSE

Mr. Chairman, members of the committee, I am Lorna Frank, prerepresenting over 4,000 Farm Bureau members in the state.

We believe SB-97 addresses the problem many farmers/ranchers, counties and the public have with orange painted posts along public roads, and the withholding of road tax money.

Where there are no fences some individuals have driven off the road into private fields. With the signs along the road as described in this bill, people will know the land along the road is private property and posted.

Also the highway department will know the road beyond the sign is a public road and will not withhold the road tax monies due to the counties.

While this may not be the complete answer, it will definitely solve some of the problem. We urge this committee to give SB-97 a do pass recommendation.

SIGNED: Lorna Frank