

MINUTES

**MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON FISH & GAME

Call to Order: By **CHAIRMAN KEN MESAROS**, on January 24, 1995, at
1:00 p.m.

ROLL CALL

Members Present:

Sen. Kenneth "Ken" Mesaros, Chairman (R)
Sen. Al Bishop, Vice Chairman (R)
Sen. William S. Crismore (R)
Sen. John R. Hertel (R)
Sen. Ken Miller (R)
Sen. Mike Sprague (R)
Sen. Gary Forrester (D)
Sen. Judy H. Jacobson (D)
Sen. Terry Klampe (D)
Sen. Bob Pipinich (D)

Members Excused: Senator Bruce Crippen

Members Absent: None

Staff Present: Andrea Merrill, Legislative Council
Serena Andrew, Committee Secretary

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

Committee Business Summary:

Hearing: SB 211, Limiting a Property Owner's
Liability toward Recreationists
Executive Action: None

{Tape: 1; Side: A; Approx. Counter: 65.

HEARING ON SB 211

Opening Statement by Sponsor:

SENATOR THOMAS KEATING, SD 35, BILLINGS, stated that the purpose of this bill is to encourage public and private landowners to open their property to recreational use by limiting the liability of landowners who do not charge for use of their property.

Proponents' Testimony:

Jim Tillotson, Billings City Attorney, said the concept of this bill is not new. Current Montana law, Sec. 70-16-301 and 302, MCA, which has been in existence since 1965, states that a public or private landowner who allows recreational use without charge does not owe that person any duty of care for an injury sustained through ordinary negligence. A landowner is liable, however, for injury or damage incurred through his willful or wanton failure to guard or warn against a dangerous condition, use, structure or activity; or an injury suffered when the landowner charges for recreational use of his property.

Mr. Tillotson continued, citing a Montana Supreme Court case from 1970 where Montana Power leased land near Mystic Lake from the federal government and allowed free public use of its tramway from the dam. A Mr. Tucker fell off the tramway and was severely injured, subsequently suing Montana Power. As a licensee of federal property, Montana Power used the existing statute as defense, claiming the statute applied to personal as well as real property, and was found to be without liability.

In 1982, there was a Federal District Court case (Fischer vs. the United States) resulting from a Missoula grade school group's free guided tour of the Lee Metcalf Wildlife Range. Some of the children played on a snowplow parked near the picnic area; the blade fell, killing a child whose parents sued the federal government. The court held the federal government was protected from liability because there was no proof of willful or wanton misconduct on the part of the government.

Based on the language of the existing statute which does not distinguish between public and private owners, local government felt comfortable with its liability responsibilities. However, in a Billings case where a girl fell from a tree and broke her arm in a city park and her parents sued the city, the city raised the existing recreational use statute. Judge Holmstrom held that the statute did not apply because the park was city-owned. His reasoning was that the purpose of the statute was to encourage property owners to open their lands to public use. Since publicly owned and maintained parks are by definition already open to the public for recreational use, it must be obvious that the statute was not intended to apply when the government was the landowner. The case went to jury trial and the jury decided there was neither liability nor negligence on the part of the city.

This case made it apparent that existing law should be clarified. SB 211, currently being heard by the committee, is based on Nebraska law in place since 1965. SB 211 does not change existing law.

Government needs limited immunity. The city of Billings owns or has conservation leases on heavily used rimrocks property which

is completely undeveloped. The city could have a problem resulting from its present policy of allowing public use of this property. Billings also owns undeveloped property along the Yellowstone River. The city could be liable for water-related injuries because there are no warning signs on its property. If this property were closed, an enforcement problem would result. Also, Billings is attempting to establish bikeways; one part of the system would be on ditch company right-of-way. The ditch company does not allow public access because of potential liability. If the ditch company could not be held liable, these rights-of-way probably could be used for bikeways.

He urged the committee's support of SB 211.

Alec Hansen, League of Cities, commented that the Billings City Attorney explained the need for this bill, and added the support of his organization as well as that of the **Montana Municipal Insurance Authority**.

John Shontz, Montana Association of Realtors, supported the bill.

Charles Brooke, representing the Yellowstone County Commissioners, supported the bill because its passage will open more public and private property for recreational use by limiting the owners' liability. **EXHIBIT 1**

Lorna Frank, Montana Farm Bureau Federation, said the 6,000 members of her organization support SB 211 because landowners should not be held liable when their property is open to public recreational use. **EXHIBIT 2**

Maureen Cleary-Schwinden, Women in Farm Economics, supported the bill and said it would open more northeastern Montana property to bird hunting.

Bob Stephens, Montana Grain Growers Association, supported the bill.

John Bloomquist, Montana Stockgrowers Association, commented that one of the points he wanted to make had to do with the Fish, Wildlife & Parks Block Management Program as well as HB 195 on hunter management and hunting access enhancement within the Block Management Program. The term "rental" on page 1, line 21 of SB 211 is an exclusion from the term "charge."

The Stockgrowers would like to see services or materials provided in exchange for access under the Block Management Program also excluded from the "charge" provisions of this bill. He suggested coordination with the provisions of HB 195.

Ken Hoovestall, Montana Snowmobilers Association, said this bill hopefully would allow more lands to be used by recreationists, but his group would like to know whether or not snowmobilers are included.

On line 18, page 1 under "Charge," he stated that trail grooming programs make agreements with private landowners and the Forest Service and some costs might be involved. Snowmobilers want to be sure these landowners are not automatically exempted from liability.

He suggested adding from the recreationist after "Charge means the amount of money asked" so that trail grooming costs do not constitute a "charge." He requested legal clarification of this point.

Referring to line 26, page 1, clubs reach agreements with landowners for groomed trails, a parking lot, etc. To clarify that, in paragraph 2 he suggested adding or with an agreement to use or occupy the property after "control of the property."

Opponents' Testimony:

Russell Hill, Montana Trial Lawyers Association, said his organization is opposed to this bill and does not favor the type of bill that insulates people from responsibility when they make mistakes. People should be responsible for their mistakes. The incredibly broad language in this bill destroys existing protection and will create problems. For example, the term "owner" applies to occupants as well as owners and users of the land. "Property" isn't just real property, it includes roads and machinery. "Charge" is very broad. "Recreation" is also too broad - it includes just enjoying the scenery.

Questions From Committee Members and Responses:

SENATOR BISHOP, SD #9, BILLINGS, asked **Mr. Tillotson**, "If a child playing in a Billings city playground were injured on a defective slide, and city employees knew the slide was defective, would this bill protect the city from liability?" **Mr. Tillotson** responded that if the city knew about the condition of the slide and did nothing to correct it, this bill would not exempt the city from liability; it would be wanton misconduct.

As another example, **SENATOR BISHOP** asked **Mr. Tillotson**, "If a private landowner had an abandoned well, would he have a duty to advise someone entering the property that the well was there, and what would happen if he didn't?" **Mr. Tillotson** replied that if the well were a blatant hazard, he thought it would fall within the "wanton" category. However, if it were a deep irrigation ditch which by its very nature is somewhat dangerous, unless there is willful misconduct on the part of the landowner, the landowner will not be responsible. This bill is designed so that landowners do not have to cure every problem on the land - "take it as you find it and I will let you go on it free."

SENATOR BISHOP commented that he wholeheartedly agreed with the concept of this bill, but was concerned about some of the liabilities, and asked **Mr. Hill's** opinion.

Mr. Hill, commenting on the language "willful" or "malicious," said gross negligence is neither willful nor malicious.

SENATOR BISHOP said he was asking about the case of the child who was injured on a slide in a city playground and found by a jury to be exempt from liability. **Mr. Hill** responded that he didn't think either case cited by **SENATOR BISHOP** would be either willful or malicious misconduct (page 3, line 8).

SENATOR BOB PIPINICH, SD #29, MISSOULA, commented that there are many old dumps containing machinery and appliances. If a child became trapped in a refrigerator or something of that sort, would this bill relieve the landowner of responsibility? **Mr. Tillotson** replied that there is a statute requiring people to properly secure refrigerators. This bill does not change existing statutes in that respect; its purpose is only to open land for recreation.

SENATOR PIPINICH asked John Bloomquist if he thought this bill would open up more land for hunting and fishing. **Mr. Bloomquist** said he thought it would, since landowners are concerned about liability. The Block Management or Hunting Enhancement Programs might be interpreted as not being gratuitous and not have the shield of the recreational statute. If those programs were included, he was sure it would have a benefit.

SENATOR TERRY KLAMPE, SD #31, FLORENCE, asked if a two-thirds vote on this bill would be required to hold the state immune and asked how it could be done for cities. **Mr. Hill** said he thought **SENATOR KLAMPE** was correct and he believed a two-thirds vote was necessary to shield the state.

SENATOR MIKE SPRAGUE, SD #6, BILLINGS, asked if the case of the child killed when the snowplow blade fell were considered negligence or gross negligence like leaving a motor running. **Mr. Tillotson** said Judge Smith found it was not willful or wanton misconduct and did not go beyond ordinary negligence.

SENATOR SPRAGUE asked how it would be interpreted if neighborhood children are invited to use a private pool during the day but returned after the property owner had gone and were injured while using the pool without permission. **Mr. Tillotson** responded that on page 2, line 28, the bill states the benefits apply when people enter by any means.

Mr. Hill, commenting on the snowplow blade, said it appeared to be negligence, but not willful or malicious. On the pool, he stated that he understood the bill was proposed to increase use of private property, but juries decide these cases and juries are not sympathetic to people bringing in nuisance lawsuits. He felt this bill would unfairly shield people who do things wrong.

SENATOR JOHN HERTEL, SD #47, MOORE, asked **SENATOR KEATING** if he were familiar with HB 195 and if it would fit together with SB

211. **SENATOR KEATING** responded that he hadn't read HB 195.

SENATOR HERTEL asked **Mr. Tillotson** if he thought the bill were too broad as far as landowners are concerned. **Mr. Tillotson** said he didn't think it was any broader than existing law that says "...a person makes recreational use of any property in the possession or under the control of...." It just says "property" and doesn't distinguish between real property or improvements to that property. In the 1970 Supreme Court case he discussed, the Supreme Court decided that property includes personal property.

CHAIRMAN KEN MESAROS, SD # 25, CASCADE, asked **Mr. Bloomquist** or **Mr. Lane** if the way liability is handled in HB 195 would fit with this bill and if coordination were necessary.

Bob Lane, Fish, Wildlife & Parks Chief Legal Counsel, responded that there is a section of HB 195 that would make the present recreational use law apply to Block Management so landowners will be protected. Some coordination will be necessary with HB 195.

CHAIRMAN MESAROS asked if HB 195 pertains only to hunting and fishing while SB 211 goes beyond that. **Mr. Lane** replied that HB 195 deals only with hunting enhancement or Block Management. Purpose of that section of the bill was to clarify the present law, get some money to landowners as part of the incentive, and ensure that the recreational use statute applies to them.

CHAIRMAN MESAROS asked **SENATOR KEATING** to explain why he was striking 70-16-301 on page 3, line 21 and on the following page, striking 70-16-302 on line 11. **SENATOR KEATING** responded those sections are current law that is being repealed. Concerning coordination, if SB 211 is passed it will replace current law, so HB 195 will merely amend this replacement law.

SENATOR BISHOP commented that **Andrea Merrill, Legislative Council staff,** found the section referred to by **SENATOR KLAMPE.** It says that a municipality has no immunity for injury to a person or property except as may be specifically provided by law through a two-thirds vote of each house of the Montana Legislature.

SENATOR BISHOP continued that "willful" and "malicious" are terms denoting a state of mind. "Malicious" means a wish to vex, annoy or injure another person or an intent to do a wrongful act. "Willful" when applied to the intent with which an act is done or omitted, denotes a purpose or willingness to commit the act or make the omission referred to.

SENATOR BISHOP said in conclusion that he liked the concept of this bill.

SENATOR SPRAGUE stated that the definitions just given by **SENATOR BISHOP** sounded like the act would be premeditated. **SENATOR BISHOP** responded that was true - the act would be committed with an intent to injure someone. This bill exempts everything just

short of that.

Closing by Sponsor:

SENATOR KEATING pointed out that his bill was intended to clarify existing law and create a friendly, cooperative atmosphere between landowners and recreational users.

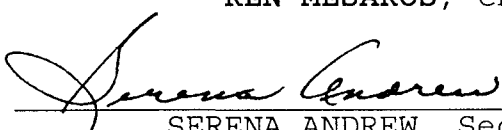
On the case of the child being injured on a slide the city knew was defective, this bill states "willful failure to guard against." If city employees knew equipment was dangerous and didn't put a sign on it, he thought the judge would find in favor of the plaintiff. He cautioned the committee that the essence of this measure is for greater recreational use of public and private property for the good of the people. The arguments he heard on the bill were good.

ADJOURNMENT

Adjournment: The meeting adjourned at 2:00 p.m.

{Tape: This meeting was recorded on Side A of One 60-Minute tape.}


KEN MESAROS, Chairman


SERENA ANDREW, Secretary

KM/sa

MONTANA SENATE
1995 LEGISLATURE
FISH AND GAME COMMITTEE

ROLL CALL

DATE _____

1/24/95

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SEN:1995

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CS-09

Post-It Fax Note 7672

To	Yell. Co. Delegation - Senate Fish + Game Committee	No. of Pages	1	Today's Date	1/24	Time	
Company		From	Yellowstone Co. Commissioners	Company			
Location		Location		Dept. Charge			
Fax #	36-1-900-225-1600	Telephone #	(406) 444-4800	Fax #		Telephone #	256-2701
Comments		Original Disposition	<input type="checkbox"/> Destroy	<input checked="" type="checkbox"/> Return		<input type="checkbox"/> Call for pickup	

County of Yellowstone

COMMISSIONERS

January 24, 1995

Yellowstone County Delegate Members
Senate Fish and Game Committee

Senator Al Bishop, Vice Chair
Senator Bruce Crippen
Senator Ken Miller
Senator Mike Sprague
Senator Gary Forrester

VIA FACSIMILE

Dear Senators,

We apologize for not being at the hearing today, but because of scheduling conflicts we are unable to be in Helena.

We would like your support of SB 211, "an act limiting a property owner's liability toward persons who make recreational use of the property".

These changes in the present law will increase public and private property available for recreation in our County and limit the owners' liability. Yellowstone County and the City of Billings have been involved in an extensive program to provide a Bike Network and trails along the Yellowstone River. This bill will limit our openness to lawsuits and benefit our citizens with more recreational use of property in our County.

If we can be of further assistance, please feel free to call (406) 256-2701.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
YELLOWSTONE COUNTY, MONTANA

Mike Mathew
Mike Mathew, Chair

Absent

James A. Ziegler, Sr., member

Bill Kennedy
Bill Kennedy, member

To: Senate
Fish & Game
Committee
Rm. 407 B



SENATE FISH AND GAME

(406) 256-2701

Box 35000
Billings, MT 59107

DATE NO. 1
DATE 1/24/95
BILL NO. SB 211



MONTANA FARM BUREAU FEDERATION

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

SENATE FISH AND GAME

HOUSE NO. 2

January 24, 1995 DATE 1/24/95


BILL NO. SB 211

Mr. Chairman, members of the committee, for the record, my name is Lorna Frank, representing over 6,000 Montana Farm Bureau members throughout the state.

Farm Bureau supports SB-211, landowners should not be held liable for accidents or injuries in cases where their property is open for public recreational use.

Instead of suing the individual property owner, people need to take the responsibility for their own actions. In most cases the property owner is not present and has no control over what an individual does and should not be held liable in case of an accident.

I urge this committee to give a do pass recommendation.


Lorna Frank, Lobbyist
Montana Farm Bureau

DATE 1/24/95

SENATE COMMITTEE ON Fish & Game

BILLS BEING HEARD TODAY: SB 211

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Willa Hall	Rails-to-Trail	HB 211		
Lorna Frank	Mt. Dorn Bureau	SB 211	✓	
Charles R. Brooks	Yellowstone County	211	✓	
Bob Lamp	DFWP	SB 211		
John Shontz	MT ASSOCIATES	211	X	
Jim Tillotson	City of Billings	211	X	
Bob Stephens	Mt. Grain Storage	211	X	
Gordon Morris	MAGE	211	X	
Maureen Cleary-Schindler	WIFE	211	X	
John Bloomquist	Mt. Stockgraves	211	X	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY