

2011 SENATE POLITICAL SUBDIVISIONS

SB 2157

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee Red River Room, State Capitol

SB 2157
January 20, 2011
13129

Conference Committee

Committee Clerk Signature

MJ Wacker

Explanation or reason for introduction of bill/resolution:

Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

Attached testimony

Senator Andrist opened the hearing on SB 2157 relating to the fee and demerit points for entering a road closed due to hazardous condition.

Senator Heckaman, District 23 introduced SB 2157. This is a bill to bring some kind of penalty for those individuals that do go around barriers. In looking for a penalty, I want something that people take seriously; apparently they aren't taking seriously the warnings that the law enforcement puts out there. There were concerns from a private citizen about having to go out in an emergency situation, and who do you call for assistance, and all you have to do is call law enforcement. They are more than willing to let you, help you get to your destination and provide the emergency services that are needed. We have some options out there for individuals. The options right now I think are good, they are advertised all over the place, you can call your radio station, listen to your radio station, get on the computer, look for weather announcements on the television channels, DOT has an excellent web page right now that has road closures and they are pretty up to date. 5-1-1 is an excellent place for us to get information on our roads. Committee I present this bill to you this morning.

Senator Andrist: What happens if your en-route to a destination and the highway patrol closed down the interstate, what happens then? **Senator Heckaman:** We would have taken the closest exit that we could to get off. My understanding from law enforcement is they allow people to get to their nearest exist or nearest town and get off from those places. Exits are not blocked; it's the entrances that are blocked.

Senator Olafson: Would you have any objection if it were the decision of the committee to double the fine and double the demerits?

Senator Heckaman: I guess my consideration on this bill, especially on the demerits, was to put an alert out there for people. If you double this to four, it's going to take about one year to get the demerits off of your bill. And that's going to be significant. We want an alert

system. I would like this bill to get through without too much of a penalty. I want enough stringent criteria so that it's a wakeup call to everybody in our communities.

Senator Laffen: I am nervous about innocently getting on to the highway and not knowing that it is closed. You don't just always get good information. I think it is a great idea if we can make sure every entrance to the road is closed, that you don't get on to it inadvertently.

Senator Heckaman: Law enforcement would take it on a case by case basis by interviewing you as to why you did get on, when did you get on, where did you get on? They don't have the manpower and it would be too expensive to close every entrance and so we're not looking at doing that. We are looking at maybe doing some more public awareness as to the seriousness of this. If you're going to get on a road and you're not sure if it's closed or not, there are options for you, 511, radio, television, cell phone, so there are options. 511 is an excellent place to call.

Senator Lee: I have people from home asking for a \$1000 fine and I don't have a problem with that either. **Senator Heckaman:** More examples are given. Senator Heckaman agreed to the \$1000 fine Senator Lee proposed.

Senator Lyson: District 1, Williston. I do have a red envelope for some amendments, but if I may, I would like to say I am in favor of the bill because it's ridiculous to have a \$ 20 fine for something that is this dangerous. **Senator Andrist:** In other words, a lot of this talk has been generated by that situation in Fargo, a month or so ago. With your amendment, all these hundred cars involved in that pileup would have to pay for the services for getting extricated from that, or conceivably could have? **Senator Lyson:** Each one of those probably had to have wrecker out there to tow them back in and they should be paying for that wrecker rather than Cass County paying for it.

Discussion followed relating to the dollar amount for fines and who pays for the towing fees for someone who went around the barrier and knew the barriers were closed.

Senator Lyson: Reading your amendment, it appears that you are deleting the demerit point deduction or the violation, is that correct? It was the amendments we brought forth that are highlighted, for the consideration of the committee.

Senator Olafson: Reading 39:10-21.1 in the Century Code as follow up to Senator Laffen' concern about people knowing or may not know that the road is actually closed, it says, "when practical may post appropriate official traffic control devices to advise motorists of the closings". It doesn't necessarily say that there has to be a road close sign there in order for the road to legally be closed and that is a concern. What has been your experience with that? **Senator Lyson:** I was only in law enforcement for 39 years, so I can't really tell you. I can never remember us ever closing a road; we put on the radio if we closed, if we don't want them to travel. If we say "absolutely no travel advised" we would be out there. If we said, "we're telling you to stay off the roads, we'd be stopping them and telling them to turn around and go back. It is impossible to close up all the roads.

Francis Ziegler, Director, North Dakota Department of Transportation, in support of 2157. See attached testimony.

Senator Andrist: Are there any gotcha concerns to this? I just want some comfort level for people that might get on innocently and find the barriers have been posted by the highway patrol.

Francis Ziegler: We work with the Highway Patrol all the time. They are very reasonable people. Referenced Senator Lyson comments to the effect that law enforcement are reasonable people. If you get on at an area where there is no gate and you get on innocently, I don't believe that you're going to get a ticket. Our whole effort has to be, to rescue people who ignore the gates.

Senator Olafson: Is this going to apply to people who are driving around road closed signs? In the current language of 39-10-21.1, it doesn't say that. It talks about a general road closure. It says when practical, may post appropriate official traffic control devices. The amendment that Senator Lyson brought in does not refer specifically to driving around gates, nor does the original text of the bill. So, if it is the intent of the prime sponsor and the Department of Transportation and law enforcement and this committee; that we want this to apply specifically to situations where people drive around a road closed barrier, than we need to put an amendment on this to that effect, would we not?

Francis Ziegler: Made reference to member of the Highway Patrol, Mr. Kyle Kirchmeier, present in the committee hearing, but not giving testimony.

Al Christianson, Represent Great River Energy. I understand what this bill is for. My concern is there is critical infrastructure out there that people need to get to. The prime sponsor has told me that if we need to get someone there because we have an issue, we can call the Highway Patrol, but nowhere does it say that or where I can find that they have to respond. My concern is that it needs to be somewhere that we have the ability in writing that we know its' allowed to ask someone to help us get there. I don't think people should drive around gates; you should use your own judgment going to work. I support trying to do something because I don't want to put anybody in jeopardy.

Mike Reitan, Assistant Chief of the West Fargo Police Department: I support this bill and ask that you pass it. We put things on Face book and Twitter; try to use all of the available resources that we have to tell people that those roads are closed. It is not an arbitrary decision to make those road closures. There is a definite need.

Senator Andrist: If this bill was to pass, and you were satisfied somebody gotten on inadvertently, would you cut them some slack, do you think?

Mike Reitan: Certainly, the officer exercises discretion. It is not hard and fast, it's not black and white all the time. We have to take in those human factors; mistakes happen, we have to understand that. It's the level of responsibility of the individual that we have in that interview with the person to see as to whether or not they are culpable.

Senator Olafson. What if we put in place a graduated fine? If you drive around an actual physical road barrier, it would be a much higher fine than if the roads have been closed. You alleged that you didn't know about it, but still you should know about it. Do you have an

obligation to know when there is inclement weather, but it seems to me we're talking about two levels of violation that are a little bit different?

Mike Reitan: I would not be opposed to a graduated situation where that actual physical barrier and that person had violated the barrier; and to have something maybe a little lesser if it was just an announcement that was made. Maybe we make an option of a graduated system available.

Senator Lee: Back to Senator Olafson's discussion about a graduated plan, they may be shouldn't have the \$1000 and \$250 or whatever dollar fines for the barricades on the interstate, but, I think they ought to be accountable as well. That is my opinion. But I want to hear yours?

Mike Reitan: The options that have been out on the table are a \$1000, \$250, and \$100 fines and I guess I would feel comfortable with the graduated system where it is increased over what we currently have as was remarked earlier. It is a slap on the wrist and a \$20 ticket for trying to make it home. A lot of people are going to assume that risk, they feel it as \$20 out of their pockets. They don't assume the risk of being stranded, their car stopping, or being hit by another vehicle on the road. They don't look to all of those things. Having an enhanced penalty from what there is currently, I am very much in favor of that. As the director and Senator Lyson indicated to having them civilly responsible for the costs associated with going out and retrieving them or retrieving their vehicles. I would be in favor of the civil portion of this also.

Senator Andrist: Anybody in the room opposed to this bill? Anybody neutral who would like to add information?

Senator Laffen: Director Francis Ziegler we heard the West Fargo Police Department talk about this idea and give us some feedback on this graduated idea, that's my only real hang-up on this too. I am 100% agreement that we shouldn't be out there and anybody goes around a closed road barrier should be thrown in jail for all I am concerned. But I am nervous about those who innocently happen to get out there and just didn't know. What would be your opinion is the difference between going around the barrier and not knowingly being on the highway?

Francis Ziegler: As referenced earlier in my testimony, the people in the West Fargo pileup we're not fined because the road was closed and they were out there before it was closed. This is very specifically for those who are going around the gates.

Senator Andrist closed hearing on SB2157.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2157
January 21, 2011
13214

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

You may make reference to "attached testimony."

Senator Andrist opened SB 2157 for committee discussion.

Senator Olafson relayed that he had a phone follow up discussion with Mr. Dawson who is the one who drafted 2157. I asked him to draft an amendment using the first two items and I took the liberty of throwing that in my own for the committee's consideration. I think we all agree that driving around a known established barrier is far more serious than the item contained in number 2. I decided to put a 4 point license demerit on that. Committee can discuss whether that's appropriate or not, whether we want to go with 2 or none at all. That is up for committee discussion of course, but I asked him to draft it that way.

On item number 2, he was going to work on the language and of course the language I have here is certainly not form and style and it's not going to look like this, but this gives them the general idea of what we are considering as a committee. We already have the draft of what Senator Lyson suggested in terms of the citizen being billed for the cost of retrieval and recovery when they drive on a road that has been closed. Mr. Dawson was going to draft the amendment using the first two items.

Senator Andrist: Regarding Senator Lyson's amendment, perhaps we should apply that just as a fine for knowingly driving around a barrier and not for those people who might inadvertently get caught in this situation. **Senator Olafson:** I agree with you. I think if we're going to adopt Senator Lyson's amendment and recommend that I think that should be in the case of item 1, not item 2. **Senator Laffen:** I would agree with that. **Senator Andrist:** I agree, my sense is that there is a pretty good consensus on what we want so maybe we could just charge Sr. Olafson with drafting the whole amendment for us.

Senator Judy Lee: The only concern I have is the 4 point demerit. I would love to see \$1000, but I'll go for the \$250, it's better than what we have. But four points? I think even though this is a severe issue were talking about here, if someone has one other point for

some innocuous thing, I really am not sure that I think that someone should lose their drivers license.

Senator Andrist: I thought it was 12 points before you lost your license. **Senator Judy Lee:** I don't have the right total here, but I think four is steep, but I could be swayed. But that seems a little heavy to me. **Senator Laffen:** I like the 4 points. I just think there is no excuse for driving around a barrier. Everybody consciously makes that decision. I would actually lobby to remove the 2 points for the not knowing one, for the same argument that the points are serious for those who drive constantly. The points are a big deal. Being fined for being on the road when you didn't know you weren't supposed to, in my opinion, that's a hefty enough fine. Points are a serious issue. **Senator Olafson:** I would be agreeable to that. I think you have a logical argument to leave the 4 on number one, and take the 2 off of number 2 and have no point demerits. I certainly would be agreeable to that. Number one is a clear cut brazen blatant violation; there is no arguing that one. Of course the burden of proof is going to be on law enforcement and the prosecutors to prove that this person knowingly drove around a barricade. It is a far different scenario than number 2, so I can send an email up to Mr. Dawson if that is the consensus of the committee that number 1 as is but we drop the point demerit on scenario number 2. **Senator Andrist:** Senator Olafson will you prepare those amendments and we'll address them next week?

Committee discussion closed.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2157
January 27, 2011
13515

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

You may make reference to "attached testimony."

Senator Andrist opened up for committee discussion SB 2157.

Senator Olafson, the consensus of the committee seemed to be that we could agree on fine of \$250 when someone actually drives around a road closed sign; and \$100 and a four point demerit on the driver's license. In the case of the road being closed but there is no signage to that effect, it's a \$100 fine, so I guess that's what the committee mainly needs to decide on. Is that is an appropriately amount or not? I've heard more than one person, including one of my constituents say, that he agreed with Senator Lee and it ought to be a \$ 1000.00.

Senator Andrist: I thought we also were going to attach, have we done Senator Lysons' suggestion that emergency services will be charged back for violators only who go around closed barriers.

Senator Olafson: Yes, we have that, proposed amendment in our ring binders here and I would support adding that amendment as well. Senator Lyson highlighted the portion of the amendment that he would like us to consider, with the yellow marker. I think it is a good idea to adopt the amendments and then get an Engrossed bill so we can actually see what it looks like plugged into the bill.

Senator Andrist: We were not going to have this apply to violators other than those who drove around barriers, wasn't that it?

Senator Olafson: That's correct, the amendment would increase, the bill was originally submitted with a \$100 fine without respect to whether was a road closed sign. **Senator Andrist:** Should we go to \$250.00 if you drive around a barrier and do we only make them pay emergency services when they go around barriers or do we for all violators?

Senator Olafson: Senator Lyson's amendment was drafted based on different subsections, so now if we adopt both of these amendments as written then Senator Lyson's amendment will be specific to "only driving around a barrier". It will not apply in the case where there is no barrier, then they wouldn't be able to recoup costs for rescue. In that situation, but as I read it, this becomes Subsection 2, amendment .01002 if the language stays as it is in Senator Lyson's then it would apply only to driving around a barrier.

Senator Dotzenrod: That's right. After listening to Senator Olafson I see how these do fit together now. If you look at Senator Lyson's amendment that item he has described in his amendment is item 2, that would be changed to item 2 that we have on the bottom of this page which would mean because it's referred to in the yellow highlighted area, subsection 2, so if you put a few dots to both of them then that would be only apply to the closed barrier.

Senator Olafson: That is where we need to be clear that that is the intent and consensus of the committee that we want it to apply just to the situation where they drive around a barrier.

Senator Olafson move that we adopt amendments .01002
Senator Dotzenrod 2nd

Senator Olafson: discussion revisit with the \$250 and the \$100.

Senator Laffen: Points, the demerit points? We're at 4 points, 0 if it's the second violation.

Roll call vote: Amendment 0.01002 5 Yea, 0 No 0 Absent

Senator Olafson move that we adopt Subsection 3 of the amendment 0.01001 from Senator Lyson

Senator Lee: 2nd

Roll call vote: 5 Yea, 0 No, 0 Absent

Carrier: Senator Dotzenrod

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2157
February 1, 2011
13790

Conference Committee

Committee Clerk Signature

M. J. Woch

Explanation or reason for introduction of bill/resolution:

Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

You may make reference to "attached testimony."

Senator Andrist opened SB 2157 for committee discussion.
All members are present.

Consider further action on SB 2157 at this time.

Senator Olafson: I move a Do Pass recommendation on SB 2157 as amended.

2nd: Senator Laffen

5 Yeas 0 No, 0 Absent

Senator Andrist: We will wait for the amended version of the bill to complete this bill.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee Red River Room, State Capitol

SB 2157
February 3, 2011
13913

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

You may make reference to "attached testimony."

Senator Andrist opened Committee Discussion on SB 2157.

Senator Olafson: What the final amendment will do is remove the two points for the Subsection 3 violation, but I would like to have the committee have the amendment actually in hand before we take action on the bill.

Senator Olafson: The engrossed version actually still reads 0003 it probably should have been changed to 4.

Senator Andrist: Does somebody want to move that we want to reconsider the action by which we gave this bill a do pass?

Senator Olafson made a motion to reconsider

Senator Laffen- 2ⁿ that motion.

Senator Andrist: All those in favor signify by saying (Aye, 5) Opposed by saying (sign). My understanding is that puts it back on the table for a motion to further amend.

Senator Olafson: I move that we further amend SB 2157 with amendments ending in 01003 which we have before us.

Senator Laffen: 2nd.

Senator Olafson walked the committee through the amendments as they pertain to the bill.

Senator Olafson: I move do pass as amended. **Senator Laffen 2nd**
Roll call vote: 5 Ayes, 0 No, 0 Absent
Carrier: Senator Dotzenrod

January 19, 2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2157

Page 1, line 2, remove "and a new paragraph to subdivision a of subsection 3 of section 39-06.1-10"

Page 1, line 3, remove "and demerit points"

Page 1, line 4, after "conditions" insert "; and to amend and reenact section 39-10-21.1 of the North Dakota Century Code, relating to entering a closed road"

Page 1, replace lines 9 through 11 with:

"SECTION 2. AMENDMENT. Section 39-10-21.1 of the North Dakota Century Code is amended and reenacted as follows:

39-10-21.1. Closing road because of hazardous conditions - Posting of official traffic-control devices - Entering closed road prohibited.

1. The highway patrol or local law enforcement authorities having jurisdiction over a road may close a road temporarily due to hazardous conditions for the protection and safety of the public. If such a closing is made, the authority ordering the closing shall make every reasonable attempt to notify the public and, when practical, may post appropriate official traffic-control devices to advise motorists of the closing. ~~Ne~~
2. A person, while operating a motor vehicle, may **not** knowingly enter a road closed under this section.
3. The highway patrol or local law enforcement having jurisdiction over a road may require a person to pay the expenses of that law enforcement agency in providing assistance to that person if that person has been cited for violation of subsection 2 and was assisted by that law enforcement agency. The law enforcement agency may retain and hold a possessory lien in any vehicle used in relation to a violation for a violation of subsection 2."

Renumber accordingly

January 21, 2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2157

Page 1, line 1, replace "a" with "two"

Page 1, line 1, replace "subdivision" with "subdivisions"

Page 1, line 2, replace the first "a" with "two"

Page 1, line 2, replace "paragraph" with "paragraphs"

Page 1, line 4, after "conditions" insert "; and to amend and reenact section 39-10-21.1 of the North Dakota Century Code, relating to entering a closed road"

Page 1, line 6, replace "A" with "Two"

Page 1, line 6, replace "subdivision" with "subdivisions"

Page 1, line 7, replace "is" with "are"

Page 1, line 8, after "of" insert "subsection 3 of"

Page 1, after line 8, insert:

"A violation of subsection 2 of section 39-10-21.1, a fee of two hundred fifty dollars."

Page 1, line 9, replace "A" with "Two"

Page 1, line 9, replace "paragraph" with "paragraphs"

Page 1, line 10, replace "is" with "are"

Page 1, line 11, after "of" insert "subsection 3 of"

Page 1, line 11, after "points" insert:

"Entering a closed road in violation of _____ 4 points
subsection 2 of section 39-10-21.1"

SECTION 3. AMENDMENT. Section 39-10-21.1 of the North Dakota Century Code is amended and reenacted as follows:

39-10-21.1. Closing road because of hazardous conditions - Posting of official traffic-control devices - Entering closed road prohibited.

1. The highway patrol or local law enforcement authorities having jurisdiction over a road may close a road temporarily due to hazardous conditions for the protection and safety of the public. If such a closing is made, the authority ordering the closing shall make every reasonable attempt to notify the public and, when practical, may post appropriate official traffic-control devices to advise motorists of the closing. ~~Ne~~
2. A person, while operating a motor vehicle, may not knowingly enter a road closed ~~under this section~~ which is posted with an appropriate traffic control device at the point of entry.

3. A person, while operating a motor vehicle, may not knowingly enter a road that is closed through reasonable public notification by law enforcement and is not posted with an appropriate traffic control device at the point of entry."

Renumber accordingly

Date: 1-27-2011
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2157

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By _____ Seconded By _____

Senators	Yes	No	Senators	Yes	No
Senator John Andrist	✓		Senator Curtis Olafson	✓	
Senator Lonnie Laffen	✓		Senator Jim Dotzenrod	✓	
Senator Judy Lee	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment Sen. Dotzenrod

If the vote is on an amendment, briefly indicate intent:

Date: 1-27-2011
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2157

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Rerefer to Appropriations Reconsider

Motion Made By Sh. Olafson Seconded By Sh. Judy Lee

Senators	Yes	No	Senators	Yes	No
Senator John Andrist	✓		Senator Curtis Olafson	✓	
Senator Lonnie Laffen	✓		Senator Jim Dotzenrod	✓	
Senator Judy Lee	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 2/3/2011
Roll Call Vote # 4

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2157

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Rerefer to Appropriations Reconsider

Motion Made By Sen. Judy Lee Seconded By Sen. Olafson

Senators	Yes	No	Senators	Yes	No
Senator John Andrist			Senator Curtis Olafson		
Senator Lonnie Laffen			Senator Jim Dotzenrod		
Senator Judy Lee					

Total (Yes) 5 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

January 27, 2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2157

Page 1, line 1, replace "a" with "two"

Page 1, line 1, replace "subdivision" with "subdivisions"

Page 1, line 4, after "conditions" insert "; to amend and reenact section 39-10-21.1 of the North Dakota Century Code, relating to entering a closed road; and to provide a penalty"

Page 1, line 6, replace "A" with "Two"

Page 1, line 6, replace "subdivision" with "subdivisions"

Page 1, line 7, replace "is" with "are"

Page 1, line 8, after the first "of" insert "subsection 3 of"

Page 1, after line 8, insert:

"A violation of subsection 2 of section 39-10-21.1, a fee of two hundred fifty dollars."

Page 1, replace line 11 with:

"Entering a closed road in violation of subsection 2 of section 39-10-21.1 4 points"

SECTION 3. AMENDMENT. Section 39-10-21.1 of the North Dakota Century Code is amended and reenacted as follows:

39-10-21.1. Closing road because of hazardous conditions - Posting of official traffic-control devices - Entering closed road prohibited.

1. The highway patrol or local law enforcement authorities having jurisdiction over a road may close a road temporarily due to hazardous conditions for the protection and safety of the public. If such a closing is made, the authority ordering the closing shall make every reasonable attempt to notify the public and, when practical, may post appropriate official traffic-control devices to advise motorists of the closing. ~~No person~~
2. An individual, while operating a motor vehicle, may not knowingly enter a road closed under this section which is posted with an appropriate traffic-control device at the point of entry.
3. An individual, while operating a motor vehicle, may not knowingly enter a road that is closed through reasonable public notification by law enforcement and which is not posted with an appropriate traffic-control device at the point of entry.
4. The highway patrol or local law enforcement having jurisdiction over a road may require an individual to pay the expenses of that law enforcement agency in providing assistance to that individual if that individual has been cited for violation of subsection 2 and was assisted by that law

Date: 2/3/2011
 Roll Call Vote # 5

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2157

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number 11,0436.01003

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Senator Olafson Seconded By Senator Laffen

Senators	Yes	No	Senators	Yes	No
Senator John Andrist	✓		Senator Curtis Olafson	✓	
Senator Lonnie Laffen	✓		Senator Jim Dotzenrod	✓	
Senator Judy Lee	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 2/13/2011
Roll Call Vote # 6

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2157

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Senator Olafson Seconded By Senator Laffen

Senators	Yes	No	Senators	Yes	No
Senator John Andrist	✓		Senator Curtis Olafson	✓	
Senator Lonnie Laffen	✓		Senator Jim Dotzenrod	✓	
Senator Judy Lee	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment Senator Dotzenrod

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2157: Political Subdivisions Committee (Sen. Andrist, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2157 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "a" with "two"

Page 1, line 1, replace "subdivision" with "subdivisions"

Page 1, line 4, after "conditions" insert "; to amend and reenact section 39-10-21.1 of the North Dakota Century Code, relating to entering a closed road; and to provide a penalty"

Page 1, line 6, replace "A" with "Two"

Page 1, line 6, replace "subdivision" with "subdivisions"

Page 1, line 7, replace "is" with "are"

Page 1, line 8, after the first "of" insert "subsection 3 of"

Page 1, after line 8, insert:

"A violation of subsection 2 of section 39-10-21.1, a fee of two hundred fifty dollars."

Page 1, replace line 11 with:

"Entering a closed road in violation of 4 points
subsection 2 of section 39-10-21.1"

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39-10-21.1. Closing road because of hazardous conditions - Posting of official traffic-control devices - Entering closed road prohibited.

1. The highway patrol or local law enforcement authorities having jurisdiction over a road may close a road temporarily due to hazardous conditions for the protection and safety of the public. If such a closing is made, the authority ordering the closing shall make every reasonable attempt to notify the public and, when practical, may post appropriate official traffic-control devices to advise motorists of the closing. ~~No person~~
2. An individual, while operating a motor vehicle, may not knowingly enter a road closed under this section which is posted with an appropriate traffic-control device at the point of entry.
3. An individual, while operating a motor vehicle, may not knowingly enter a road that is closed through reasonable public notification by law enforcement and which is not posted with an appropriate traffic-control device at the point of entry.
4. The highway patrol or local law enforcement having jurisdiction over a road may require an individual to pay the expenses of that law enforcement agency in providing assistance to that individual if that individual has been cited for violation of subsection 2 and was assisted by that law enforcement agency. The law enforcement agency may retain and hold a possessory lien in any vehicle used in relation to a violation for a violation of subsection 2."

Renumber accordingly

2011 HOUSE TRANSPORTATION

SB 2157

2011 HOUSE STANDING COMMITTEE MINUTES

House Transportation Committee
Fort Totten Room, State Capitol

SB 2157
03/17/2011
Job # 15601

Conference Committee

Committee Clerk Signature

Mary Brucher

Explanation or reason for introduction of bill/resolution:

SB 2157 is a bill relating to the fee and demerit points for entering a road closed due to hazardous conditions; relating to entering a closed road; and to provide a penalty.

Minutes:

Attachment #1, #2, and #3

Senator Joan Heckaman, District 23, introduced SB 2157 and spoke to support the bill. She provided written testimony. See attachment #1.

Representative Delmore: In Section 4 it says that the Highway Patrol MAY be charged for expenses? How will they determine that? Can they decide that Representative Weisz is going to be charged for that but I'm not when we're both sitting in the same place on the road? I understand why it's not mandated but I would like to know how they are going to decide. How do you put a dollar amount on that? Last weekend brought a lot of things to mind but in that case it wasn't really anybody violating the law it was because the highway wasn't closed when it probably should have been.

Senator Joan Heckaman: I think it's a very difficult section to keep in that bill because of the problems that will arise, such as what dollar amount do you put on that? This bill wouldn't have changed anything in last week's situation. Most people didn't go around the barrier except I know one from Minot on the way to Bismarck that did as we heard that on the news but that person is probably not going to be able to pay a fine. I was driving on the highway and came upon some water in the road. There were no warnings posted so I didn't think the water would be that deep. When I drove through it a sheet of water came up over the hood of my car. I made it through but it was dangerous. I stopped at the next small town and informed the local authorities of the situation. When we look at what the cost is I know that all of you who were stranded out there did have to pay your towing fees. I'm not sure how the other expenses would work. If you catch Senator Lyson ask him please.

Chairman Ruby: I had some of those issues too because I know with the Christmas storm you're talking about there were a lot of rescue personnel, not just law enforcement but there was also DOT and county snowplows and a wide variety of other agencies that worked on that and would like to be included in that section as well.

Representative Heller: When you drove through the water, how would this bill have helped you?

Senator Joan Heckaman: This bill wouldn't have helped that situation but I wanted to point out that this bill would help in situations where there is water also. It's not just snow storms. If the barrier would have been there and I would have gone around it and had gotten into real trouble then I would have gotten a fine in this bill. So it's more of a point of what this bill will do rather than not have a barrier there at the time.

Representative Heller: On line 6 page 2 it says "you may not knowingly enter." How will the Highway Patrol be able to tell if you "knowingly" entered a closed road?

Senator Joan Heckaman: When I visited with law enforcement on that they informed me that when they stop you they will interrogate you pretty good and ask you questions to determine how you got out there. We have a number of ways to find out if roads are closed; 511, internet, radio, television, cell phones, etc. If you're out there on a strictly emergency basis, for example, your wife is having a baby and you need to get to town they are not going to stop you for that. They will use common sense in situations. If they stop an individual and they say "Did you know the road was closed?" and they would say "No" then they would ask where they got on the road and if they heard the weather report. They can find out to the best of their abilities.

Representative Heller: In this proposed amendment you say that it's okay if someone is going to work for a utility organization and for them to enter the road. What does "utility" mean? Does it mean oil rig workers or the ethanol plant or Dakota Gasification or what do you consider "utility?"

Senator Joan Heckaman: Utility vehicles in this instance are those that would be used in an emergency such as your utility companies that may be covering downed power lines.

Representative Heller: Since Dakota Gasification runs 24-7 there always has to be workers there and new shifts of workers have to drive on Hwy 83 to get to work, can they not go to work?

Senator Joan Heckaman: I would say no. They should not be going to work. I think some of those places cancel their shifts. I was on the radio once with this bill and that was the first question that came through. I told them to call their local law enforcement or your highway patrol and tell them your need. The stakeholders that asked for these amendments understand that is possible but they wanted it in code so that those people can go out and take care of those downed power lines and fix those utilities that are needed. I don't think we're including gasification plants unless the person who testifies indicates so.

Representative Weisz: What if you are private land owner and have to get to your property and go around the barrier?

Senator Joan Heckaman: I guess I would question who put the barrier up then ask them for permission to go around. What I understand from the law enforcement people that I

visited with is that there are ways to get to where you need to go especially when you're a land owner. We're looking at the Devils Lake area where there is going to be a lot of barriers put up and landowners that need to get to their homes will be able to do that based on the situation but this is not addressed in this bill. I don't think we want to specifically put this in this bill because it is addressing more of the major roads that are closed.

Representative Frantsvog: I would like to follow up on the comments of Representative Heller about the words "may not knowingly" and is that at the discretion of law enforcement?

Senator Joan Heckaman: I think it would be. I'm not sure if that needs to be in the bill or not but that addresses the fine that's listed on page 1 line 9 where if you get on at a place where there is no barrier and the road has been closed for several hours there should be no reason why you should be on that road. This last week was a real testimony of that where there are ways that this bill is not going to work and there are times when it wouldn't be in effect. Last week there were people that were on the roads and then they closed so nobody is going to fine them then. I also heard of people going around on Highway 10 and accessing the road where they could so that would be an instance of a violation in this as they knowingly went around the barriers. That's up to the highway patrol to do the questioning or the person who is picking you up who does that.

Representative Delmore: People that were anxious to get home on Saturday and if they were stopped by the patrol some of them were allowed to go back on the interstate and go to their destination. What about the people who decided they needed to get home so they would go around the barrier then they would be in violation of this statute, would they not?

Senator Joan Heckaman: Certainly. Barriers are out there for a reason.

Chairman Ruby: It is already a \$20 fine for going around the barrier. Why wouldn't it just be amending the language of going around the barrier or are we repealing some of the existing language that talks about the \$20 fine?

Senator Joan Heckaman: We are changing the \$20 fine. The original bill said that if you go around a barrier it would be \$100 fine and two points on your driver's license. Then more things have been added on this bill.

Chairman Ruby: Currently, is it \$20?

Senator Joan Heckaman: Yes. The highway patrol found that from the people they find going around the barriers \$20 isn't really anything to them anymore. The penalty for the points is really where I wanted to go with the original bill and that's how the \$100 fine got started and two points.

Chairman Ruby: Maybe that's in another penalty section because I don't see it striking that \$20 anywhere.

Senator Joan Heckaman: I'm wondering if that was struck in the original bill but this is the amended version of the bill. I don't see where the \$20 was taken out of the original bill but

now that I'm thinking about it the Highway Patrol said that \$20 fine covers a variety of other issues.

Representative Gruchalla: If there is no specific fine in statute, then the \$20 fine will apply.

Senator Joan Heckaman: I am open to suggestions on amendments but I really want to keep the part in there about increasing that fine and some kind of points on the drivers' license. I'm not married to subsection 4 of this bill.

Bob Graveline, Utility Services of North Dakota, spoke to support SB 2157. He proposed an amendment. See attachment #2. It is important recognize there are times when emergency and service personnel need to get to a location to repair a situation whether there is a flood or a storm or not. Utility personnel do not always drive Class A, B, and C vehicles, they often drive their pickups or a suburban depending on the type of work they are doing. If you were to accept Senator Heckaman's amendment we would like to add Class D vehicles in there as well. In bona fide critical emergency situations if we need gas to stay warm and the gas plant is producing gas then obviously that would be a critical situation, especially if you're a person who could run out of gas in the winter. If you are passing this bill and from a safety perspective we think that would be fine, we would like the exception to the utility personnel. Utility would mean a broad base utility.

Representative R. Kelsch: We need to find the definition of "utilities" as written in the Code. I believe that also includes wireless companies.

Bob Graveline: I believe it does but also the public service commission does not regulate all utilities so that's why we intended it to be a broad term.

Representative R. Kelsch: Except that I do believe that it's in that section of code that it does define what utility is and so it would be beneficial to know what the definition of utility is to make sure that you have that covered. I know that South Dakota law has the exemption of going around the barriers because the wireless company there had their generators go out and their generators were on for almost eight hours so they needed to get additional generators in there but the roads were closed so by law they couldn't get to the cell towers. They had to have a highway patrol take them to the towers. The legislature then made sure that utilities were covered in their law.

Chairman Ruby: Is Class D broad enough? It would be saying Class C or D authorized emergency vehicles or vehicles operated by utility organization personnel.

Bob Graveline: However the words work to make it as broad based as we can for covering all the utility situations. Obviously if somebody needs to get to a coal plant for a shift changes then they are going to have to get there.

Representative Heller: That would include Dakota Gas, Antelope Valley, Blue Flint Ethanol, etc. Who does this include and who doesn't? How would that be spelled out in the law? What about the coal mines that supply the coal?

Bob Graveline: The coal mines and the coal plants generally have a stockpile of coal and hopefully the storms won't last that long. The plant workers would definitely be included. If the ethanol plants have a critical situation when it goes down and runs out of electricity that is not something you just flip a switch and you're back on line you are talking about a several day experience to bring these huge plants back on line. In my opinion and the way we drafted this we wanted this to be as broad as possible. The people that are going out there are doing so for a specific purpose. They are well schooled and are trained personnel who have storm kits in their car and radio communication. This is not just the travelling public these are people who are on a mission to do their job.

Representative Heller: I think I heard you say "I think they would be included." This would have to be clearer to me because there are so many workers that this would cover. If this law was put into place and if the law enforcement stops you it wouldn't take long for someone to say they work for a utility company because they know that's an exemption.

Bob Graveline: That's a most interesting question. I would refer that to someone in the field.

Representative R. Kelsch: It is clear in here that it's responding to critical or emergency situations. I think the way they would know that is if there is an outage at one of the plants and those personnel are key to getting that plant operational. I would also assume that the highway patrol would have been notified about that if there is a critical outage. I'm not sure if they are considered part of utilities and that is the question. We need the definition of "utilities" because I don't know that some of those are considered "utilities."

Chairman Ruby: Once you start with exceptions, you are going to have a lot more people that want to be part of that.

Representative Gruchalla: Do you have the definition of a Class D vehicle?

Bob Graveline: That would be as an addition because that would pretty much include all vehicles. Class D include passenger vehicles and Class A, B, and C goes by passenger size, weight loads, pulling trailers, or whatever.

Darcy Rosendahl, Operations Director for the North Dakota Department of Transportation, spoke to support SB 2157 and provided written testimony. See attachment #3.

Representative R. Kelsch: Do you know what it cost the state of North Dakota for the rescue efforts during the New Year's Eve storm? Do you have any costs cumulated from this last storm?

Darcy Rosendahl: We do not have that information. We would have to go back and summarize it. There is a report out that talk about the costs of closing roads to a state based on loss of economy and things like that. We have not compiled the costs for our people to go out during the rescue efforts.

Representative R. Kelsch: It might be interesting just to see what some of those costs are and have it available even if it's just a ballpark figure. I know it's a loss to the economy but is it something that is a complete loss to the state or is it something that balances out?

Darcy Rosendahl: We could go back because we have that information on the DOT labor hours, equipment rentals, etc. We wouldn't have the Highway Patrol information.

Chairman Ruby: The problem I have with Section 4 is that don't we pay our taxes to have emergency services?

Darcy Rosendahl: Is that the one where you go around the gait?

Chairman Ruby: That's where you would have to pay law enforcement for additional expenses.

Darcy Rosendahl: We are not here to dictate the fine; we'll leave that up to the law makers. The current fine that is in place doesn't seem like a deterrent.

Chairman Ruby: You're looking more at the deterrence with the fines and not so much as far as recouping expenses from responding to the call?

Darcy Rosendahl: I think that would be a fair statement, yes.

Representative Delmore: You have no information from the New Years storm as to what extra amounts were paid out just with DOT alone?

Darcy Rosendahl: We haven't compiled them. We could go back and get those though.

Chairman Ruby: If you could that would be good.

Representative Frantsvog: How often is 511 updated?

Darcy Rosendahl: About every hour. Calls come in to our road reporters and then they feed that information to the 511 system and then they put out the 511.

Representative Owens: I run North Dakota's 511 systems. As soon as it's updated the lag time is 3 ½ minutes from the time they put it in their system to the time it hits the telephone. The frequency of the updates is up to each state, we have no control over that.

Representative R. Kelsch: Has this become an issue where North Dakotans become somewhat skeptical about weather forecasts or road conditions and then coupling that with really low fines are making them nonbelievers in the system?

Darcy Rosendahl: I don't know if I have a good answer for that. We are very careful about when we issue a travel alert or a no travel advisory for that very reason. We don't want to put it out and then something doesn't occur and then they think we are issuing them when there isn't a need. We are dealing with Mother Nature so the timing of it or the intensity may have changed from what we had anticipated.

Chairman Ruby: When I was starting out driving trucks as a young man many times I'd be out there and heard the travel advisories. I'd call my dad and he would tell me to keep going. I was out there many times with no travel advised and it really wasn't that bad out there most times. There is a lot of that out there so by taking your normal precautions, slowing down, and being careful then it really isn't that hazardous to drive.

Darcy Rosendahl: We have revised these in the last few years where we settled in on these three; the travel alert, no travel advised, and roads closed. We try to put them over a geographic area and you're not going to cover everything but we try to cover counties and major cities that they can recognize no travel.

Representative Heller: That is my point, if the road is closed by Bismarck and Max but I need to jog on Highway 83 for five miles to get to Dakota Gas and 200 isn't closed conditions could be way different than they are in Bismarck or Max I could get picked up, lose four points on my license, and get that big fine for driving on it for five miles when the road conditions aren't even bad and I haven't even driven around a barrier.

Darcy Rosendahl: That's a possibility. We try to put the gates by facilities where people could stay. It's tough to define the exact places where roads could be closed; we just do generalities from Bismarck to Washburn or Bismarck to Minot. It's tough to say from Bismarck to reference point 85 with a five mile increment in there that wouldn't be open and then all the way up to Minot. And conditions change so much that it's hard to dictate those kinds of exceptions.

Representative Hogan: I just need to say thank you. Lots of us went home on Friday, we were really dumb. You guys did a terrific job and I just think we need to say thank you to you and all your staff.

Representative Delmore: As we look at gates that come down they are pretty understandable as it's obvious if I'm driving around one. How about blockades and barriers that may go down on some of the secondary roads, do you try to post a Highway Patrolman or law enforcement there to tell motorists not to drive on the roads?

Darcy Rosendahl: We don't post a Highway Patrol person. At times they will try and man some of those but they don't have the personnel to man all those either. In situations where we have flooding the DOT has positioned people at some of those barricades to try and alert the people not to drive on them. We don't have the enforcement ability so if somebody opts to go around them we don't try and stop them.

Representative Delmore: Part of the problem is what Representative Heller was referring to when she said its fine on an interstate where there is limited access. We have a number of roads where I can get from point A to point C in many clever ways and may not be a part of where that road is closed. What happens then to those people? Do they get it socked to them too when they had no idea that the road was closed?

Darcy Rosendahl: I don't know if I have an answer to that one.

Representative Owens: It was something you just said in response to Representative Delmore when you said you have no legal authority to stop people if you're standing there from going around the barricade?

Darcy Rosendahl: No, we are not an enforcement agency so we can't do that. The Highway Patrol can do this.

Representative Owens: Oh, okay. I thought you meant those people can't be stopped from going around a barricade but the Highway Patrol can do that. I understand now.

Al Christianson, Great River Energy, spoke in opposition to SB 2157. I can't agree with the amendments. I supported this bill in the senate committee with a request that they look at people that work in power plants and other places. Then they changed it in the senate and added a bunch more things. Having worked in a power plant for the past 34 years and having made the trip from Washburn to Coal Creek Station for 27 years at midnight, 3am, or whenever there have been times when the road has been closed and it could be like fall or summer in Washburn. I do not like this bill for that reason plus after listening to what happened in committee today there are going to be so many "what about me" issues. I have a real respect for the fact if there is a barrier there I'm not going around it. But I also have the understanding if you look at Coal Creek Station which is 1200 megawatts and some of the people I work for in Minnesota may deserve a carbon free day but when it's 30 below and the plant goes down we need to get the guy in Bismarck that knows how to fix it. Those are the cases where some people have specialties that need to get there. We never put our people's lives in jeopardy knowingly, safety is first for us. They will come in as a pair, travel as a pair, have winter survival kits, and we notify the Highway Patrolman. For the guy who lives two miles north of Washburn where the sun is shining and Highway 83 is closed because it's lousy at Max or Wilton and goes over to Beulah to the gas plant it doesn't make a lot of sense. To me the \$20 for going around the barrier is not much of a deterrent but I really can't see how you can write a law to take care of that. There is an economic hardship of losing 1200 megawatts to the customers of Minnesota or Basin Electric losing one of theirs because their expert can't get there. To me, leaving the law the same would be best but I don't agree with the amendments because I don't think you can define Great River Energy as a utility under the statutes because we don't follow under PSC. I oppose the bill even though I supported it earlier. I came out here today to support it with the amendments but as I listened to the conversations I can no longer support this bill. We hope that you take care of it.

Chairman Ruby: Do you have options if it's really bad and the people can't make it in for a shift change, do you have people who will stay on and continue working, is that allowed?

Al Christianson: It has happened in the past that people will stay. We have provisions there; we have cots so people can take a break. When I was first on operations we had eighteen people on a night shift and we now run with nine people so you get to the point where you're running a power plant like that. The only time things break is when it's lousy out. I have stayed there for 36 hours in the past. I am now lucky, I have a job where I no longer feel required to show up for my job. We have worked with the DOT closely in our district and they call us and tell us they are pulling the plows in an hour or are having this issue and our people can make a determination if they want to drive to Washburn or if they

want to stay. I think there is a very gray area here that you're going to have a tough time writing a law to take care of the economy.

There was no further testimony. Hearing closed on SB 2157.

2011 HOUSE STANDING COMMITTEE MINUTES

House Transportation Committee
Fort Totten Room, State Capitol

SB 2157
03/18/2011
Job # 15674

Conference Committee

Committee Clerk Signature

Mary Brucker

Minutes:

No attachments.

Chairman Ruby brought SB 2157 before the committee. I think there were parts that most people agreed to and there were parts that most people didn't agree with. I believe Subsection 4 is completely unworkable. Darcy talked to me yesterday and said they didn't have a way to break out the costs for the Christmas blizzard. They have a cost but it includes the clean-up too. I don't think we wanted to know how much it took them to do all the snow removal and such as well. They are setting up their system somewhat different in identifying costs.

Representative Gruchalla: In Clay County the Sheriff assesses fees if they go around a closed road. If they have to send out a snowplow or two he assesses a fee for the time and a half, an hourly rate, a mileage rate for the vehicles, and sends them a bill. It is workable and it's being done. He had a bill that came to almost \$3,000 last winter. There is always the issue of how to collect it because it took them half the night and a snowplow to get out there.

Chairman Ruby: I believe that they can identify how much each piece of equipment is going to cost so that part is doable. This one only works with law enforcement so then why isn't there a provision here for DOT, county, city, or whoever may have to go out and assist? Aren't our taxes supposed to cover some of this?

Representative Weisz: Let's use my example, I go out there when I shouldn't have and I get stranded. I am more than willing to sit and wait until the blizzard quits but somebody calls in and says there's a stranded vehicle so they come out and get me. Why should I have to pay?

Representative Weisz moved an amendment to change the fee to \$250 for going around a barrier.

Representative Owens seconded the motion.

Representative Gruchalla: That means we're taking out the four points?

Chairman Ruby: Yes.

Representative Dave Weiler: What is the \$100 fee on line 9?

Chairman Ruby: That was for being on a closed highway and not going around the gate.

Representative Dave Weiler: We're getting rid of that, correct?

Chairman Ruby: Correct.

Representative Frantsvog: What was the amount of this, \$250?

Chairman Ruby: Yes, it's a \$250 fine. It's a stiff fine but they said they gave some people citations for going around the snow gate.

Representative Onstad: Do we have any basic traffic violations that are that kind of a fee with no points on their license?

Chairman Ruby: The most recent one I can think of is littering that we just passed out of the house. That fine is up to \$500.

Representative Onstad: And no points on your driver's license?

Chairman Ruby: No, I don't believe so.

We have a motion for an amendment. A voice vote was taken: MOTION CARRIED.

Chairman Ruby: We have an amended bill before us. What are the wishes of the committee?

Representative R. Kelsch: I make a motion for DO PASS WITH AMENDMENTS.

Representative Gruchalla: Seconded.

**A roll call vote was taken: YES 12 NO 1 ABSENT 1
MOTION CARRIED.**

Representative Sukut will carry SB 2157.

Date: 3/18/11
 Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2157

House TRANSPORTATION Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Weisz Seconded By Owens

Representatives	Yes	No	Representatives	Yes	No
Chairman Ruby			Representative Delmore		
Vice Chairman Weiler			Representative Gruchalla		
Representative Frantsvog			Representative Hogan		
Representative Heller			Representative Onstad		
Representative R. Kelsch					
Representative Louser					
Representative Owens					
Representative Sukut					
Representative Vigesaa					
Representative Weisz					

Roll Call Note
Motion Carried

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

*amend.
to
\$250 fee*

VR
3/21/11

March 21, 2011

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2157

Page 1, line 1, replace "two" with "a"

Page 1, line 1, replace "subdivisions" with "subdivision"

Page 1, line 2, remove "and a new paragraph to subdivision a of subsection 3 of section 39-06.1-10"

Page 1, line 3, remove "and demerit points"

Page 1, line 7, replace "Two" with "A"

Page 1, line 7, replace "subdivisions" with "subdivision"

Page 1, line 8, replace "are" with "is"

Page 1, remove line 9

Page 1, remove lines 12 through 15

Page 2, remove lines 6 through 14

Renumber accordingly

Date: 3/18/11

Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2157

House TRANSPORTATION Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By R. Kelsch Seconded By Gruchalla

Representatives	Yes	No	Representatives	Yes	No
Chairman Ruby	X		Representative Delmore		
Vice Chairman Weiler		X	Representative Gruchalla	X	
Representative Frantsvog	X		Representative Hogan	X	
Representative Heller	X		Representative Onstad	X	
Representative R. Kelsch	X				
Representative Louser	X				
Representative Owens	X				
Representative Sukut	X				
Representative Vigasaa	X				
Representative Weisz	X				

Total (Yes) 12 No 1

Absent 1

Floor Assignment Sukut

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2157, as engrossed: Transportation Committee (Rep. Ruby, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2157 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "two" with "a"

Page 1, line 1, replace "subdivisions" with "subdivision"

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Page 1, remove line 9

Page 1, remove lines 12 through 15

Page 2, remove lines 6 through 14

Re-number accordingly

2011 SENATE POLITICAL SUBDIVISIONS

CONFERENCE COMMITTEE

SB 2157

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2157
April 7, 2011
16423 (29:05)

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

You may make reference to "attached testimony."

Senator Dotzenrod opened the Senate Political Subdivisions Conference Committee on SB 2157. Senators Dotzenrod, Laffen, Andrist and Representatives Delmore, Heller, Weiler were present.

Senator Dotzenrod, Chairman. The issue that we have in front of this conference committee is the House amendments to the SB 2157. The version 02002 and I guess the first step in this process would be to ask the members who served on the House committee to explain to the conference committee the amendments that they adopted and the reasons for adopting those amendments.

Representative Weiler: In Section 1, line 9, where we crossed 'a violation of subsection 3 of Section 39:21.1' a fee of \$100. The reason that we eliminated that is because that is a fine of \$100 for being on a closed road. The circumstances that we discussed in our committee were that I could be driving on US83, by Ruby Tuesdays and I could be driving north and 10 minutes after I get passed the gate, they close the gate. Now I am going to fined \$100. I was on that road when the road was not closed, they closed it after I got passed the gate and now they're going to fine me \$100 and I don't think. The House Transportation Committee didn't feel that was something that was # one very easily enforceable, and # 2, we felt that's its very unfair to the citizens of North Dakota to be fined for being on a road was closed after you entered the road. So that would be the reason we removed that. On page 1, line 14-15, we just simply removed the points for entering a closed road. We didn't feel, we thought it was fairly strict with the \$250 the way it was. We didn't feel that it was necessary to add points in this situation. Page 2, we removed Subsection 3-4 mainly subsection 4. I think the heartache with the committee there was that an individual was going to be required to pay the expenses of law enforcement through assistance to help that individual. I think mainly and I would hope that the other members of the committee from the House side would jump in after me and certainly give additional explanation. I think from our standpoint, how are you going to determine what that expense is? Is it just the towing violation, or if there is damage to a law enforcement vehicle, is it

strictly due to that particular case? We just felt that was something that was just a little bit over the top.

Representative Delmore: You got this right after what happened in Fargo. We were fortunate to have a little more time. One of the questions that I asked was what would the cost have been? Well they still have no way of determining that was the answer. I don't like things that vague if I am passing a law and somebody is going to be susceptible to an amount unknown. And so I think that also influenced us deciding not to do that section. We had a lot of problems with the committee with the enforcement of this. Depending upon the officer you get, a lot of things could happen; whether they by your story or not, whether the story is true. On the interstate it's pretty obvious when you go around a major gate. If you're on Highway 83 and you enter somewhere, anywhere along those secondary roads, I don't know how you close all of them number1, and if you enter that way it's pretty hard to prove yes or no to somebody. I think while we appreciated the intent of the bill, we're all aware of what's happened and we don't think that anybody right to be violating. There were a lot of unanswered questions that will follow the bill itself.

Representative Heller: One other thing that was brought up in committee in regards to having the person pay for expenses was, well it was brought out in our committee if I went around the gate, and I am quite well prepared for winter survival and I don't really want to be rescued and someone comes and rescues me and I don't want him to, and then I have to pay that bill. So that is another problem with charging people for being rescued.

Representative Weiler: Another thing that came up as well is there were no exceptions in here. I believe we have mines and things like that people have to get out there. If they are driving a 4 wheel drive vehicle and they have to get out to one of those facilities for a shift change or something like that, there were no exceptions. I think what we would really like to see Mr. Chairman, we obviously did agree to the one violation of a \$250 fine. After speaking with the Chairman of the Transportation Committee in the House, and several other house members that were very surprised that the bill passed the way it did, because it is a big jump from \$20 to \$250 especially. I believe we passed a bill already this session that allows cities and counties to double the fines. If that is going to be allowed and all of a sudden this can turn into a \$500 fine, you know that is pretty steep. So, what we would like to do is have the Senate agree to our amendments and further amend on page 1 line 10, that the fee be changed from \$250 to \$100.

Representative Heller: I would like to also further amend what Representative Weiller said and limit this only to state and federal highways in the state and leave county roads out of it.

Senator Andrist: I feel that I was one of the moderate voices on this in our committee. I too shared concerns about particularly what Rep. Weiler points out, being on a road and not knowing that it closed. I think that is why we put the language 'may'. It seems to me rather fruitless to put in a restricting thing may not knowingly enter a road and then not providing for any kind of penalty if they do. I can't see any sense in that language. I would certainly welcome language, if the House felt it was necessary to put more caveats into whether you knowingly entered the road or not; if there is any way to reinforce that. I think our committee was most strongly felt about driving around a road barrier as to lessening

that fine, and incidentally the Senate rejected the bills that would've doubled fines. I would not want to change that \$250 because that's passed both Houses. I don't think that belongs on the table, because that would be changing the intent of both legislative bodies. I am open to consideration. My feelings from the beginning that this is one of those bills that is well suited to some kind of compromise position because obviously the Senate felt much more strongly about this issue than the House did.

Senator Laffen: We struggled with this. If you're out on the highway, once the roads have been closed and in fact that happened to all of us shortly after we worked on this bill when the big blizzard hit. We all went home on that Friday, we were all on Interstate 94, and out there for 6 hours on that road and it had been closed for at least 4 hours behind me after I left town. That is a hard one to enforce, but I thought we had sort of allowed language that a highway patrolman would have discretion of discussing of how you got out there, did you knowingly get out there and leave that up to them. We heard a lot of testimony about driving around the barriers, not driving around barriers, but about people being out on these highways that they shouldn't have been out there. They knew the roads were closed, they said they had to get to Wahpeton for whatever that day and the highway patrolmen have to go out there and put their lives on the line. They brought two snow plows and a highway patrol car just to get to these people and get them out of there once they've gotten stuck out in these roads. It seemed to me absurd, that we would allow people to drive around a barrier and put their lives, highway patrolman lives and the snow plow drivers' lives in danger like that for a \$20 fine. It was my opinion on the committee that the people who likely drive around those barriers also have the opinion that \$250 isn't a really big deal. But points are a big deal. Example cited. I don't think that driving around a barrier is an offense we should let go that lightly.

Representative Heller: How do you know if somebody has driven around it unless you have physically seen them driving around it? How do you know they entered that road around that barrier? Because if they close it at one point you can enter roads every ten miles; how do you?

Senator Laffen: You have to leave a lot of it under the discretion of the Highway Patrol officer who will stop somebody. Example cited.

Representative Heller: Well would've you drove around that barrier if it would've been there? **Senator Laffen:** Absolutely not. No. I was on a back road and came to Interstate 29, got on at Argusville, road was closed and I didn't know it. That is part of what we discussed here. That one is harder to tell. But, had I told him I got on at Argusville, and he knew where were all the barriers, so we had that discussion about the fact there is no barriers at Argusville, and I think these Highway Patrol are pretty sharp. They are out here every day they know where people are getting on and off, certain roads. They ask and if somebody tells them, they got on at an interchange he knows has a barrier, and then he is going to have the discretion to give a little stiffer fine.

Representative Weiler: Certainly want to offend anyone in this room, or anybody, considering driving around any gates, but I think this came about because of this global storm that we had, whether it was a month ago or whenever it and I think this could quite possibly be a slight over reaction to what had happened during that storm. I also know that

day was a Friday and I believe we went into Session at 12:30 and were in for about 20 minutes, and then we adjourned and that is when people started leaving. From 10AM if you looked out the windows of the capital building, you couldn't see 20 ft in front of you. So if you're going to get on a road, out in the county when in town you can't see 20ft in front of you, if you are going to put yourself at risk, under those circumstances I don't know what legislation we could ever possibly do. You cannot legislate stupidity and I will just leave it at that.

Senator Andrist: I think it is important for our House member to know was that bill was introduced early. It was not a reaction to that situation and I am not really sure of the time line. We may have even taken final action on the bill before that situation happened. It is my opinion that any good highway patrolman, any good judge when he saw the circumstances of that storm and how quickly, it came up and how many people were affected, would not have been handing out citations. But there are some people that react in other situations where it's not that sudden and they well, we can beat the system. They drive around that barrier. I just wanted to share that information with you that the Senate feels pretty strongly that we should not authorize people to drive around barriers. Any language that would, would say it would have to be a knowing violation, and we could sort it out, I would certainly consider, but I don't think it, if the Senate and I am not speaking for myself, I feel that I have to defend the Senate position on the thing that people shouldn't drive around those barriers and there should be a hefty fine if they do; because they can put people's lives at risk in addition to their own.

Senator Laffen: I would like to respond to Representative Weiler on that storm that day. I am one of those who got caught out there. But it wasn't quite as bad as you made out when we left. Our session went 45 -60 minutes and actually downtown and shot photos back at the capital what it was like when I left town. You could still see the capitol building from downtown. I took off then and drove 80 mph to Steele and you could see fine, so I drove 45 minutes out there before I ran into a wall of a blizzard. I can tell you that if the barriers had been down when I left town, we wouldn't have been out there. It wasn't as bad as one would think when we left session and it came up very quickly. There had been blizzard warnings but if you drive as many miles as a lot of us do have to drive, that was the 10th blizzard warning this year, nine of which I drove through just fine.

Representative Weiler: Again I think the House also is pretty strong on our stance that we feel that the points are excessive. That the fine of \$100 for being on a road is just, there is no way you can enforce that. There is no way you can determine what the damages are, so we would hope that the Senate would agree to our amendments and we would hope that we could consider lowering the fine from \$250 down to \$100.

Chairman Dotzenrod: Just a couple for myself. That last Section 4, which was brought in to our committee by Senator Lyson. He proposed that as a law enforcement person retired from law enforcement and he thought we should have that on there. I think he was presenting that there are other states that have this and use this. They use the word 'may' and its sorts of option that they can when they see an egregious situation, they have as law enforcement they can bring this into effect, but it's not going to be a routine procedure they do on every situation but having that 'may' gives them some options when they deal with something that is really over the top; when they see violations of going through gates when

it shouldn't have been done. The other issue I think that was in our committee and I read through the House minutes too, was the question of the people who work at these utilities, energy companies, coal plants, there is a grey area that for those people it does seem. I read in the minutes that South Dakota has a provision that exempts from this, those individuals that work at any of the utilities that provide power. That is an issue that we haven't really got to yet. There may be cases of emergency vehicles, ambulances, fire trucks, there might be some circumstances where even if something is closed. There are individuals that are going to have to get there, because it may be a matter of life or death for some in some circumstances. That is an issue that we haven't really talked about, but there ought to be a way to allow them.

Representative Delmore: We did talk about a laundry list. The problem that comes in footing a laundry list in any bill, for those of us that have been there, is what if I leave you out. You are as important. I think that's why we just kind of considered maybe the highway Patrol is going to have to make call. I can't imagine them fining an ambulance driver who is one his way somewhere and literally have to get there to save someone's life. It was discussed but I think a laundry list is really hard because where do you draw the line?

Senator Dotzenrod: I did see Representative Delmore that in the House minutes a Section 5 proposed as an amendment that was not adopted by a committee that attempted to do that.

It appears this conference committee is going to have to meet again. We will adjourn for now, and will notify everyone when we can find the time when everybody is free and will try and get together again.

Conference Committee adjourned.

Committee Discussion.

Senator Andrist: I don't have any problem will you being chairman. But if I run into problems with Leadership, sometimes they, as in last session, they get a little bit upset on this. Only if I find that they are will I do that.

Senator Dotzenrod: I am very comfortable being a member of the committee and not the chairman, so whatever, works best. In fact I was going to ask you if we could switch places. It is just an issue we don't have to deal with.

Senator Andrist: I suspect what happened is on the sheet I just put you down first, but I don't think I specified you as Chairman.

Senator Dotzenrod: I respectfully resign being Chairman of the Senate Political Subdivision subcommittee on SB 2157 and turn it over to Chairman Andrist.

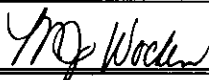
2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2157
April 12, 2011
16506

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Conference committee on SB 2157: Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

Chairman Andrist opened the Sub -Committee hearing on SB2157. Senators Andrist, Laffen, Dotzenrod; and Representatives Weiler, Heller, Delmore were present.

Chairman Andrist: I did communicate with you by email. We sat and visited and are pretty well willing to accede to the house amendments, but felt rather strongly that there should be some penalty for willful violation of driving on roads that have been closed by the Highway Patrol. Willful means that they knew it was closed; were more concerned that there be a penalty and how much the penalty would be.

Representative Heller: I just think that is too big of a grey area because the willful that you willfully drove on the roads and it's closed. I think it's going to be way too hard to prove if you knew it was closed or not. You're leaving that decision up to a person who is very subjective? **Chairman Andrist:** Don't you feel that would be the responsibility of the arresting officer to prove that it was willful? I think the burden of proof would always be on the prosecution. He would have to have evidence in order to cite you. Beyond that I can't imagine why he would cite you, if he wasn't convinced and willful.

Senator Laffen: One example that I can think of that this would be really useful is the Highway Patrolman who stops you and notifies lets you know this road is closed for whatever the reason is up ahead. But without any and then says you need to exit at the next exit, and you just continue to drive on the highway. Why wouldn't I just continue to drive on the highway if there is no fear of any retribution? You can't tell me anything at that point. He just stopped me and told me that the road is closed, he now knows of the road closed and I really don't have to vacate or do anything. I am not going to get fined at all.

Representative Weiler: If a road is closed would they not have to go around a barrier to get to a closed road? Because I suppose there are some roads that would be closed but would not have a barrier. **Chairman Andrist:** I think if they drove around a barrier, then it would be covered under Section 1. So that takes care of it. But what we're talking about is a road that is closed and it doesn't have a barrier.

Representative Heller: How often is your scenario going to happen? So we're going to put into code something that is going to probably going to affect one in a thousand situations. I mean I just don't think we have to write that down in code. I just don't think we have to write that down in code. I just don't agree with that. Okay the road is closed in Bismarck, and it's closed by Max. I get on by Washburn. Okay, so I don't listen to the radio in my car, I don't ever have the television on at home and this is true, I don't know the road is closed. Maybe by Washburn it's really storming in Bismarck and Max and by Washburn it's not storming. So, I go out on the road, and you're going to fine me for doing that? **Senator Laffen:** No, because it's not willful. **Representative Heller:** So somebody has to prove that. **Chairman Andrist:** Somebody has to prove you did it willfully then, that you knew it. **Representative Heller:** That is very subjective to me. **Senator Laffen:** The reason I like this piece is that it takes the subjectivity away. There has to be some proof that you willfully knew and that's easy to do. You're either going to have to drive around a highway patrolman or get stopped by one who told this road is closed. The reason I like this is we are finally getting in place in North Dakota a system that helps alert people to stay off certain roads at certain times. For whatever the reason, right now Interstate 29 is closed, but there are four exists that get you on to I-29 that isn't blocked off. There is no road gate closures on all of those accessed from Hillsboro on. They've got some barricades at Hillsboro that force you off the road. But all the exists coming in and if you happen to be driving on those you can get on to I-29 and you will end up in a flooded area of the road. The highway patrol does not want to have to pull people out of that road. They're out there telling people this road is closed, but without at least some sort of penalty, once you go pass them and they've told you, people are just going to keep driving. It seems to me we just need a \$20 fine more than anything to help people in our state understand we do have a road closure system now. It is on the internet and it's on 511, and you can call if you're wondering. There is a way to know, but the only way we're going to get this education out there is to be able to start telling people that the road's closed.

Senator Dotzenrod: I think what we're discussing here is whether or not to remove the overstrike on page 2, on line 6-8. I think that's the subject of our discussion right now. Should that overstrike which the House aligned that through and removed it from the bill? So I think what we are talking about on page 2, whether that should come off or stay off, that overstrike. It does say in there, "may not knowingly", line 6, knowingly enter, it doesn't say should have known that a road is closed, which would be a different matter. I think if you say in here, may not knowingly enter, if you're going to get cited your burden on the citing officer is he is going to start narrowing down by asking questions to you. Do you know the road is closed? When did you get on the road? What time did you start driving on the road? I think the patrolman will realize in a minute before they pretty much know after the discussion whether you were aware of the road closure or not. I think that burden by saying may not knowingly enter, that puts quite a high burden on the officer at the site because he has to be able to prove that you knew it. If he can prove that than it seems like there ought to be some action of some kind.

Representative Weiler: On page 2, line 6-8 it says an individual operating a motor vehicle may not knowingly enter a road that is closed through reasonable public notification by law enforcement. So that includes radio, television, or if a police officer happened to be waving or flagging you down and saying you can't go any further. This road is closed. Then the

individual goes on anyway. But it is through public notification by law enforcement so that to me leaves that a little more open for the law enforcement because they can say well, it's on the radio and television. It's not so much just as Senator Laffen said that it's basically when an officer tells you that the road is closed and then you go on it anyway. **Chairman**

Andrist: So you're suggesting Representative Weiler that we change the House amendments to include page 2, lines 6-8? We were ready to accede to that. You deleted a penalty for violation on Subsection 2. **Representative Weiler:** My apologies Mr. Chairman. I see that in Subsection 2. As long as then what you're proposing that language on line 7, isn't a concern to me because it leaves it opens. Now how about the people who work at the power plants, out in the energy sector and they've got to get to their jobs or they've got to get from work to home. They're probably going to know maybe because there's been an announcement that the road is closed, but they have to get there anyway. Now we're going to go and fine them. I guess I really feel that we have to leave the decision up to individuals in certain circumstances that if they know the road is closed, but they go out anyway, that's their problem. I hate to be so harsh, but at what point does the Highway Patrol just lets' them go. If you're going to go, go ahead, but we're not coming after you. You know it's closed!

Chairman Andrist: Look again at Subsection 2, an individual while operating a motor vehicle may not knowingly enter road closed which is posted with an appropriate traffic controlled device. So they have to knowingly ignore the traffic controlled device which would be a road closed sign of some kind or a barrier of some kind. It seems to me that its cuts them an awful lot of slack. **Representative Weiler:** 'which is posted with an

appropriate traffic controlled device", so that means basically a barrier. That is already covered then in section 1. **Chairman Andrist:** I haven't asked for a definition of the traffic controlled device, I presumed that a sign would also be a traffic control device. It's kind of a mute point I think. I don't think they run around putting up signs, I think they put barriers where they do it. I really didn't look at that last line which is posted with a device. I don't see where this is ever going to get applied. **Representative Delmore:** There is also a

difference in the definitions of willfully and knowingly. I wonder if Samantha can pull that up from the section of the code just so we can see. We use those terms in judiciary on numerous bills and there is a difference between the proofs that has to be made for each of those. That might be helpful if we could use that for interpretation for the committee.

Representative Weiler: I think it's been relayed to me, through the Chairman of the House Transportation and others; this is not the feelings of the House conferees on this committee. But it has been brought to my attention that they would probably just assume have the bill go away, so if there has to be language in here that there is some kind of a fine for willfully or knowingly being on a closed road, it may not pass in the House and then we lose everything. **Chairman Andrist:** Rep. Weiler, we can understand what an ultimatum is. We can talk about this and have a different meeting. I guess one question I would like to ask, if we're going to confer to advocate for the Senate section would your committee have the objections to removing Subsection 2? I can't see any purpose of having it in there, if

there is not to be a penalty.

Senator Dotzenrod: If you look on page 1, line 10, it's says a violation of subsection 2 is a fee of \$250. So I am not even sure if I follow your suggestion to remove subsection 2.

Chairman Andrist: I misreading it then. Okay, beg your pardon. Subsection 2 applies to a \$250 fine. **Representative Weiler:** If you want to remove that we will be happy too.

Chairman Andrist: In the House amendments. What we would need is for our position would be to include Subsection 3 in there and then negotiate what the penalty should be.

Representative Weiler: That is why I guess I was reading that before because that would be the language that you would want entered back in there. **Chairman Andrist:** Yes, you're correct and I apologize for misunderstanding the bill.

Samantha Kramer, our legal intern handed out Chap. 12: 1-02 of the Century Code about liability and culpability.

Senator Laffen: If I could revisit for just a second, this bill originally came to our committee as a penalty for driving on a closed road. We heard testimony from the Highway Patrol that people just don't understand the severity of some of the situations. It related to two incidences over the last winter whereby the roads were closed through the normal postings. It really isn't an issue of driving around the barricades, its people being continually out there on the roads and not understanding that there closed and the HP have to go out there and get them. Our HP is never going to be in a position where they say we told you the road was closed; we're not coming to get you. Our state will never do that, they aren't going to let those people be stranded out there. So this is an effort to have some sort of penalty that people would start to understand that when roads are closed there's a penalty to pay for not listening to that. I thought that made some sense. We thought the bill had a problem with two issues. It didn't say anything about knowingly or you can get on these roads and not know it that there closed. So we tried to divide it and say there's a difference between being on the road and driving around a barrier and you know the road is closed. We thought that was deserving of a fine. We thought that just being on a road, accidentally getting on a road, was an offense that maybe gets a warning or whatever. The Highway Patrol needed some sort of device to be able to tell people that roads are closed and that's serious business. So if you don't have a fine for knowingly being on a closed road than you really don't have a closed road. So the question becomes almost, does the Highway Patrol have the ability to close the roads? **Chairman Andrist:** Removal of Subsection 3 removes any responsibility for not entering a road unless it's got a barrier across it.

Representative Delmore: What if we would change Section 3 too willfully? That says that you engage in the conduct intentionally, knowingly or recklessly. It is a little higher standard to me than the knowingly. Knowingly has a little more grey area. It is the standard of proof that someone is held too, and maybe if we change that to, willfully, I think that is a stronger verbiage. You've been told you really do know it's dangerous to go out there and you decide no, I am just going to do it anyway. It is a possible compromise to look at different language that might be agreeable. **Chairman Andrist:** That would not be a game breaker for me, I don't know about the other committee members.

Representative Weiler: I would like to pass out some potential amendments and we can look at these. The amendments in front of us change it a little bit. The motion would be the Senate would accede to the House amendments and we further amend by stating that this fine for going around a road closed sign a road barrier or a traffic controlled device looks like, would only pertain to state or federal highways. We changed the fine from \$250 to \$100. I would move the amendment Mr. Chairman. **Chairman Andrist: We have a motion for amendments 02003. Is there a second? Representative Heller 2nd.** Personally I would resist the amendment because I think it opens up a whole new issue that we didn't discuss in our committee and apparently you didn't accept it in your committee. From a practical standpoint, I don't think anybody but the state closes roads for weather conditions.

A county might close a road for a bridge out or something like that. But, at least from my perspective in our area, the county doesn't have the people running around closing roads when there is a storm for a more serious issue. **Representative Weiler:** I guess that is the point of the amendment is because how many counties and township roads actually get closed, how many actually get a barrier put up? They don't so let's just narrow it to the state and federal highways. I guess that would be the purpose of it. **Chairman Andrist:** You're proposing? **Representative Weiler:** We're proposing everything that the bill as it entered the conference committee with the House amendments on it and add in that it only pertains to state or federal highway. **Chairman Andrist:** So what you're saying in your amendment then a bridge comes out, it's on a county highway, the county decides to put up a barrier and somebody drives around the barrier and he's not guilty of any violation?

Representative Weiler: I do believe there already is something on the books that's a \$20 fine because that is current law for going around a barrier. So they would be fined \$20 on a county or township road I believe.

Senator Dotzenrod: In one way I could be okay with the state or federal highway thing; I can see part of that. Most of the problems we heard about in testimony have to do with the large volumes of vehicles that get on these highways and interfere with the ability of the crews to clean the highways up after a storm. It takes quite a job to get those vehicles out of the way so they can get the road cleared and so there is public safety with the people being out there plus the question of getting the traffic moving again. I think that is a big part of the issue. On the other hand, if the county does have reason to close the road it's probably a more serious problem with just having the road be unserviceable. I do think if that if the county does close the road, it's probably pretty serious problems. To me it wouldn't be a deal breaker if we had to accept that, but I do think that as terms of the fine, the House has passed it for \$250 and the Senate has passed it for \$250, I don't really see any reason to change that dollar amount.

Chairman Andrist: We'll get some thought to Rep. Weiler's amendment and we would like to ask you to give some thought for restoring Subsection 3 with some penalty, tweaked language as suggested by Representative Delmore. I don't think it would be a game breaker. The amount of the fine is not significant to us, but we think there should be some small penalty. We are not being territorial, we just don't care what the language is, and we aren't trying to protect the Senate language we just want to get this resolved in a way we think is in the spirit that we passed it. **Representative Weiler:** We will discuss some restoration of Subsection 3 with the word willful. **Chairman Andrist:** And if we can do that I think we can accede to whatever other concerns you might have.

Chairman Andrist adjourned the conference committee.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2157
April 14, 2011
16600

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Conference committee meeting on SB 2157, relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

You may make reference to "attached testimony."

Chairman Andrist opened the Conference committee on SB 2157. Senators Andrist, Laffen, Dotzenrod, Representative Delmore, Heller, Weiler present.

Chairman Andrist: One of the questions that came up was how would emergency vehicles, particularly on Highway 83 be affected by this bill. He asked Al Christenson to step to the podium about some of the negotiations you've had with the Highway Department as you were looking at this bill.

Al Christenson: Represent Great River Energy. What we have done was after the bill came out and we got to the point that we thought there was going to be a change, and our concern was the ability to get people to our facilities that need to be running twenty four /seven. As we looked at it, in the Senate committee hearing we were told that the Highway Patrol if you called them they would let you through or if you told them you were from a plant. We had a storm the week after and that didn't happen. We ended up having to call the DOT and asked them to call the Highway Patrol to allow our people to go. We had some people there for 30 + hours. The Blue Flynn Ethanol Plant had a breakdown where they needed a special mechanic to come in to fix it, and he couldn't get through. What he did was he went and took a back road which is a lot less safe than Highway 83. So we met with the utilities, captain of the highway patrol, and the DOT district engineers and we've reached an agreement with them that for our situation we will have safety meetings at all the plants in the area this fall and have in place who we need to call if we need to get through on this blocked roads. So we'll be able to call the DOT and a Highway Patrolman and say we're going to have 5 people come to the gate to come in at a certain time. We were also told by the DOT and HP if it was an emergency situation where the road was physically blocked that you couldn't get through that they would be a snowplow and escort if it was in case of keeping the plant running or not. We think that in that case we have an option to get there; we will be able to do what we need to do by doing this.

Representative Delmore: And I assume that same agreement would be for police, ambulance, and any other emergency vehicle. Part of the problem we talked about it earlier, is who might you leave off that laundry list, but I think if the Highway Patrol and DOT can be flexible and offer that type of a reasonable measure of yes we will make sure your people will get through in an emergency situation. Are you comfortable with that?

Al Christenson: I am comfortable that what the concerns that we had to get to our power plants are taken care of with this. One of the things that's happened in the past and why the HP has been going away from what they've done in the earlier life. If you just told them you were going to Cold Creek and they would let you through, is that they've had instances where six people are in the car and say they're taking one person to the plant because he has to work there and the other five are going out ice fishing. So we thought is there a way to show an ID or a way to do this. But in reality what it amounts to is, because safety is so important to our people we would rather have to go through these steps and make sure that we can get them there than having them go on the back roads. As far as like an ambulance or anything like that, they will do the same thing. But the problem is that it has to get out to the HP or people have to know how to contact the HP and how to contact the DOT to do it. We're going to get all of our people indoctrinated on how to do it and our operating authority at each of our plants will then have the contact information so they need to do it. That is what we are going to try to do. We think we can make it work for us. However, my concerns are still that the people that live in Washburn and drive to the power plants; and not once has the road physically been closed at Washburn. The part of the bill that says that I wouldn't have been unknowingly on a closed road they would've had to give me a fine. Our concern to getting out people to the plant, we think we can do it now with our arrangement.

Representative Heller: Al, so are you talking just for Great River Energy and you guys have a plan? So where does it leave Dakota Gasification and all the plants over by Beulah?

Al Christenson: What we talked to them we are going to take it to the Energy Managers meeting which is a group of all the plants and utilities in the area, and give them the same opportunity our safety people are going to head this up for us. They are going to go to their meetings they have this summer and say if you want to put this into place here is what you need to do. Some people will do it, some won't. But for us, we've solved our issue we think as far as getting our people there. I have no concern personally or from Great River. If I drive around a barrier and you catch me, fine me whatever you want to fine me. Knowingly going on a road I have a real issue with that. The driver's license and the points that's a real issue too. But driving around a barrier, you can't legislate stupidity.

Representative Weiler: The points are not in there. **Al Christenson:** The House took them out. Chairman Andrist: I mostly wanted to get testimony because it would give us some comfort knowing that the HP is prepared to deal with these situations. **Representative Weiler:** Al, you say you have a plan to get people there, how about the people leaving because there shift is up. Is there a plan for them to get home or are they going to have to stay there? **Al Christenson:** What we've had in place now for the last 10 years with the DOT is that they call us and let us know when they are going to take the plows off the road and that is when we try to get non-essential personal out of there. In the case of whether we have to bring in essential personal and the roads are closed, our plan would be for the people stay there. We have facilities, food and places to sleep for them. The issue we have

is there are times we have a thousand construction workers there, we have no place for them. They will get on the highway and go. The last storm had seven of those people in his car. We have no plan for them.

Chairman Andrist: It was also suggested and we were talking about our interest in restoring line 6-8 which was violations where there wasn't a barrier in place. It was suggested that if we did this, that we change the word knowingly to willfully which is a higher standard. As you remember from our previous meetings the Senates concern was we thought there should be some penalty for people who knowingly or willfully disobey a road closure order. The rest of the bill the Senate was quite agreeable to accept your recommendations on it.

Representative Delmore: I have a motion I would like to make and see what the feel of the committee. **Chairman Andrist:** You are welcome to make a motion at any time.

Representative Delmore: I am using the engrossed Senate bill (02002) that was sent to us. I would move that we remove Section 2. I would move that we **accede to the Senate amendments and further amend to remove section 2 lines 12-15**. On the second page of the bill remove number 4, lines 9-14; and that we change line 3 on page 2, knowingly to willfully and line 6 on page 2 knowingly to willfully. It's in there in their Engrossment right on the front page. That way the fees remain \$100 and \$250, we are removing the points. If we need to go further with this bill next time, because people continue to do this, I think we can go another step. But I think right now that is a pretty hefty increase for someone to do. So I would move those amendments if I could? **Chairman Andrist:** Is there a 2nd to that motion? **Senator Laffen:** 2nd.

Chairman Andrist: Just so I understand it. This would leave driving around the barrier subject to a \$250 fine. It would provide for a \$100 fine if a person willfully entered a road that had been closed.

Discussion:

Representative Weiler: I am going to oppose the motion. In reinserting on page 2, line 6-8 with the exception of knowingly now become willfully, this is if you're on a road that is closed you're going to get a \$100 fine. **Chairman Andrist:** Only if the HP fines that you willfully entered a road that you know was closed. **Representative Delmore:** In other words if I may not have any idea that they closed it because I didn't have a radio on whatever. It would not apply to me? It's if I knew that road was closed and knew there was no barrier there and some of them on the interstate are not barricaded, but I have to go around that willfully get on the road and I know it was closed and I made that call. **Representative Weiler:** Subsection 4 on page 2, is not going to be part of the bill? **Representative Delmore:** Correct, that was part of my amendment. **Chairman Andrist:** So subsection 4 remains deleted? **Representative Delmore:** Yes. **Chairman Andrist:** Yes. Okay. Is there any further discussion on the amendment? If the House members can agree to this I think the Senate members could agree to the removal of the points and the other contentious part of it.

Representative Delmore: As I said earlier, I think it's a good compromise. It does set up some tougher language than we've had, but I don't think we need to make it quite as steep as what the original bill did. I mean that adding to the expenses when it was on our side, they couldn't possibly tell me what those expenses were. Well I am not willing to have you bypass and they can make up the expenses for whatever it might be. I think we need more information and I think we need to see if this compromise will work.

Senator Dotzenrod: I did go visit with Senator Lyson who had proposed to us this amendment and he said he wasn't too concerned if we deleted that. He thought when he introduced that I he knows it is used in other states and he thought it was a tool that probably wouldn't get used very much; but that if it was available that was why he introduced it. I think it seems to be fine to delete that.

Chairman Andrist: If we approve this motion I think we would come back one time more and look at it in context. **Representative Delmore:** There maybe some other words that has to be changed because of references to sections.

Roll call vote: 5 Yeas 1 No 0 absent

Discussion

Representative Weiler: I think it's pretty clear what's in here. I don't know that there is a need but if you really feel there is a need to meet again we can certainly do it on Saturday. Do we really need to meet again? **Chairman Andrist:** It wouldn't be my intent to meet Saturday but if the committee was comfortable we could get the amendments drafted and I'd have the clerk whole it until you've had a chance to review and be satisfied. I think the committee members would like to make sure and see what it looks like and would be happy to hear a preference suggested? **Representative Weiler:** It's not me that's relieved that we won't be meeting on Saturday, I am here anyway. I was hoping to influence the rest of the committee members that may have to stick around for Saturday that we wrap it up today. **Chairman Andrist:** We in the Senate understand sneakiness. **Representative Weiler:** We in the House understand that. **Representative Delmore:** I will give this my markup that I have and any questions she can find me. **Chairman Andrist:** We can come back in the morning tomorrow and that would be great. The amendments will be drafted; it's a quick get together. It would give me a little comfort to make sure the committee members are satisfied with the amendments. We appreciate the fact that we've been able to get together and that's when the best progress is made when people work in the spirit in making things work instead of becoming territorial. Thank you!

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee Red River Room, State Capitol

SB 2157
April 20, 2011
16757

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to the fee and demerit points for entering a road closed due to hazardous conditions.

Minutes:

You may make reference to "attached testimony."

Chairman Andrist opened the conference committee on SB2157. Let the record show that all members are present.

Chairman Andrist: House members I have to share this with you. I've never experienced this in ten sessions. Our ethics rules in the Senate are to get the person carrying the bill on the floor has to be somebody who voted with the majority report. I don't understand why Representative Weiler was carrying the bill. I don't understand. I happened to walk into the House accidentally at the time the bill was coming to the floor. So I stopped and listened. Representative Weiler was not truthful in what we had done. The other two committee members were complicit they did not respond to it. The House was not told the action of the committee. The House was not told the concessions that the Senate has made, the biggest part of it was we spent so much time word-smithing the culpability level and we were told that you can inadvertently drive onto a road and be fined \$100. It's simply not truthful. I am really upset and I have to share this with you and ask for a response. And the final thing is we made a deal and then you stand up and testify against the deal. If you're going to make a deal we want to know what kind of deal it is that you're going to defend when it goes to the floor. I invite your response.

Representative Weiler: First of all I looked into the rules regarding who has to carry the bill. And there are no rules that say whom carry the bill, who has to carry a bill or who cannot carry a bill. It is tradition in the regular committees that we throughout the session that whoever, that generally the bill carrier is one that supported the bill. It is also been tradition that in conference committees, that the chairman from each side is the one that carries the bill. So, in regards to your comment that we did not follow the rules, there are no rules regarding who carries the bill. I believe I let this committee know that there were concerns regarding the language in Subsection 3, I did not support that language in Subsection 3, I did not support the \$100 fine for being on that closed road and therefore Mr. Chairman I spoke against it and enough of the House members by a vote of 83-11 agreed with me.

Chairman Andrist: Rep. Weiler, we have to avoid getting into an entrapment in spending all of our time in a he said/she said thing. But I heard the testimony. You clearly said that a person could inadvertently be fined \$100. We worked hard to make sure that we had clarified language that that could not happen. Even if your House rules permit the minority vote to speak on the bill, I am sure that they should reflect what the conference committee decided not the personal feelings of the person who is carrying the bill. And there was no explanation of the conference committee's action. It was only the same argument that Rep. Weiler made before the committee before we took our action. It just really disappoints me. I don't know where we're at; I know what you really want for this bill. Is it our ethics or our rules or whatever, I am not sure of its rules, but when we present a conference committee report we believe that you're supposed to provide an explanation of what the conference committee did. There was none of that in Rep. Weiler's testimony. His only effort to kill the bill saying the Senate was intransigent and would make no concessions.

Representative Weiler: Well Mr. Chairman. There was not an effort to kill the bill. I beg to differ with that with all due respect. If there had been an effort to kill the bill; and if we would've had a plan which we certainly did not have a plan, but if there had been a plan to kill the bill which you stated then we would've passed the conference committee report and killed the bill. So Mr. Chairman we did not, there was not a plan to kill the bill and when I explained what the conference committee did, I explained that it was the wishes of the House to have the Senate accede from their amendments or accede to the House amendments and put the bill, have the bill go to your floor with the \$250 fine for going around a barrier. It was very clear that the Senate would not do that; they would not take it to the floor of the Senate and attempt that. I guess I understand your point and since that wasn't tried we agreed to the one amendment putting Subsection 3 back in with the \$100 fine and apparently by a vote of 83-11 the rest of the House members did not agree with that. One more comment in regards to the testimony I think that I did a fair job in explaining exactly what the committee did. This bill came to us with these changes. The way the bill came to us, it had the three different items in it. It had that the citizen is going to cover the expenses; it had the \$100 fine and the \$250 fine, yes and the points. The House passed out before was simply we got rid of all that stuff and we kept the \$250 fine and quite frankly I am concerned about the \$250 fine today. I am not sure that the House will even pass that.

Chairman Andrist: Let me respond Rep. Weiler by apologizing for saying you attempted to kill the bill. I did misspeak there. I realize that you didn't attempt to kill the bill you attempted to kill the conference committee report. I've said my peace, other committee members how do you wish to respond to this? I am trying to search for what you really do want because we had 5 of the 6 of us voted for what I thought we wanted and then the House didn't respond against what we decided. They responded based on the testimony they heard from the floor I feel. Is there anybody else who wished to contribute to this conversation?

Senator Laffen: I tend to agree. I think that if this were explained in the fashion of what we did in conference committee I think this would pass on the House floor. But I too would like to know if this isn't what the House wants. Where do we go from here?

Representative Delmore: I offered up a compromise in good faith going back to the House floor it was all kinds of opposition. That was the reason that I believe. I would rather send this back to the conference committee and work some more than to kill the bill because I think there are elements of it that are needed. I don't think anybody tried to pull anything over on anyone. It

was the way that it was going on the House floor; nothing anybody said was going to change that. That's why the conference committee report was defeated so soundly. When I offered that amendment I had no idea there was that much animosity. That's why I tried to make it a better bill on something that I thought we could buy off of.

Senator Dotzenrod: I don't know exactly what the chemistry was over there in the House side, but do you think there was an infraction on the floor of the House that someone could be fined for inadvertently being on a road that was closed?

Representative Delmore: I think there were people that were opposed to it just because it was a \$100 fine because of the number of motorist's right in the Bismarck area that would've had to pay that. I think that was the source. I don't think, if you read the bill in the way that it was written, I don't think it says at all just because I wander onto a road and I have no knowledge I can be fined. But I think they objected to the \$100 and they objected to the portion of the bill that we agreed too. We've had the same thing happen on the Senate side with the cities raising the fines. There is a feeling amongst many of the people that they don't want to do that. I voted for that as well. I am not against it, but for it.

Chairman Andrist: You know earlier, in our conference discussion we suggested and we thought that a willful or a knowing violation it was your choice to make it willful, and we concurred with that, that a willful violation should have some fine. We really didn't care how much so it was your own suggestion that we leave it at \$100 and change the standard to willful. That was what the committee accepted. I do feel that if the testimony was clear to me on the floor that the House was told it could be inadvertent and I just felt this was dishonest.

Representative Weiler: Well Mr. Chairman, thank you. I guess I would just like to bring up the point that in the people that I talked too. I think the real concern was the fact that the decision would be left up to law enforcement as to whether you willfully are on that road or not. I believe that I explained that on the floor and if somebody cares to check the record of that. Now, willfully, Mr. Chairman, if I am on a road I am there because I willfully am there. I am not there because I don't want to be there. I think the problem is that you could close a road in Bismarck, and you could close a road in Minot, and you do not know you may enter that road in Washburn or Max, and not know the road is closed but in the language of Subsection 3, its says an individual while operating a motor vehicle may not willfully enter a road that is closed through reasonable public notification. Reasonable public notification could be through the radio and as I explained on the floor, that not everybody listens to the radio, so willfully is left up to law enforcement. The people that I spoke to on the House side, they had a real problem with the fact that decision was going to be left up to law enforcement. In the case of the closed road with a barrier with a \$250 fine it's very clear that they need to catch you driving around a barrier. That is understood because that is pretty cut and dry. But the language in Subsection 3 was simply a problem for many of the people in the House.

Chairman Andrist: I think Rep. Weiler does have a point that the word smithing could be better. Would you look kindly on the idea of changing Subsection 3 so that it was more clearly pointed out that they entered the road despite knowing or willfully entered the road knowing that the road had been closed by the authorities? Something to the effect that we

made it clear that it was that they entered the road willfully, but they entered the road knowing that they were in violation.

Representative Heller: I don't really see why that would make it better because you still leaving that up to the law enforcement. I just don't know how he is going to determine if you knowingly knew it was closed. I just don't know how they can do that.

Chairman Andrist: Law enforcement doesn't determine guilt or innocence. They determine whether in their eyes there may have been a violation. The judge determines what it is and if we have the proper wording, the burden of proof is going to be on the prosecuting attorney to prove that it was a willful violation and not an inadvertent violation.

Representative Heller: I think that is the biggest objection in the House. They do not like that section at all. If you're inclined to it, I would like to make a motion that if we could discuss the motion. **Chairman Andrist:** We can always discuss a motion. Are the committee members ready then?

Senator Dotzenrod: Maybe before we do make a motion, I would like to discuss what the possibilities would be. One possibility would be to delete that Section 3, another possibility would be take the \$100 fine down to some level like \$25.00. We had going into this session, a fee for going around a barrier was \$20.00, so you had the fine of \$25.00 for that. Another thought would be in Section 3, to say 'willfully and recklessly'. I think if you willfully and recklessly enter a road that is an unusual set of circumstances to recklessly enter a road, you have to then do that. That is not normal behavior to be caught on a road and to be reckless in being there. I think they have the burden of proof on law enforcement. It would be pretty tough for them to demonstrate or prove. So I think there are several choices, but I guess my thought off hand is to change the \$100.00 fine to a \$25.00 fine. I do kind of think the concept of the law enforcement being able to instruct people to get off of roads and be able to do it with some authority is kind of an important concept. If there is inclement weather or a dangerous situation, they ought to have some authority in law to be able to instruct people to get off that road. So there are some options and choices.

Chairman Andrist: I might say thanks to Rep. Delmore for providing the sheet with the terminology. (Adding the word recklessly, if he engages in the conduct in conscience and clearly unjustifiable disregard of the substantial likelihood of the existence of the relevant facts or risks). Chairman Andrist continued with the definition of reckless terminology. It is really a high standard.

Representative Weiler: Committee members if it is the Senate's wish to continue to keep Subsection 3 in the bill and put whatever language, knowingly, willfully and recklessly we can certainly attempt to do that. However, it is clearly the wishes of the House by a vote of 83-11 that they do not like that section. If you want the bill killed, then let's put that language in Subsection 3 knowingly, willfully, recklessly anyone, any combination or all three. We will bring that to the floor and I promise you that will be defeated a long with the \$250 fine. It is the House's desire that we make it a stricter penalty for going around a barrier. The language in Subsection 3 is not something that the House likes. So, as I stated before, I have real concerns even about the \$250 fine. Right now the fee is \$20.00 and a jump to \$100.00 is huge. I guess whatever the Senate wishes to do, to end the discussion.

I apologize if this is turned into a bill that is taking on so much time and so much discussion because clearly there may be many more important things that we need to solve in the last remaining days of the session. But if it's the Senate wishes to make another attempt at continuing to have Subsection 3, and we can certainly do that, and we can bring it to the floor, and I will promise you Mr. Chairman that if you can get two House members on this committee to support any type of language in Subsection 3, I will let one of them carry the bill. But I can't guarantee I'm not going to get up and speak on it.

Senator Dotzenrod: You know maybe it's one of those things where if this idea of Subsection 3, has some value of importance it may have to wait to a different legislative session because I do think the idea of going around barriers rises to a level of importance such that it would be an important concept to get into the statute at this time. I don't know how many conferees are cheerleaders for this subsection 3. Probably not very many, but it would nice to have some cheerleaders on the House side supporting it. I don't think there is any there, so in that circumstance I think maybe we should just be willing to go along and just have the way the bill came from the House.

Chairman Andrist: I would like to hear from the other two members of the House Committee if they concur with Rep. Weiler if you feel; you were the two that voted for this, do you now feel differently? Would you like to have this whole subsection taken out?

Representative Heller: Yes, after I got back to the House floor and told people what we had done, they were totally not happy with what we had done. I know that this will not pass if we leave Subsection 3 in. I guess I am not a fortune teller but the very likelihood of it passing is probably less than 20%.

Chairman Andrist: Are you confident that they do understand that it would have to be a willful violation and not an inadvertent one?

Representative Heller: Yes, they just don't like this section. **Senator Dotzenrod:** I think one thing that happened that wasn't really for seen there was a story in the paper that had a picture with it that showed these barriers on the outskirts of Bismarck and the story told about all the large number of people that went around them. I think many people saw the story and thought that could've been me. I think that influenced some of the thinking and I may be wrong about that, but the timing of that story and the way this bill was moving through, I think was a set of circumstances that gave us this kind of outcome. I think it had something to do with it.

Representative Delmore: That was the point that I made earlier. When it was brought I thought we could make that work, and I thought it was a good compromise. I don't know that I wouldn't still support it but I don't think. I don't want to see the whole bill die because even if we take a baby step on this, at this stage of the game, at least we can get those people that are just willfully going around barriers.

Chairman Andrist: It's clear the greater danger is on the interstate system where they use barriers.

Representative Heller: If I can make a motion. **Chairman Andrist:** You may.

Representative Heller: I would like to make a motion that the Senate accede to the House amendments and I would like to further amend for the fine to be \$100. **Chairman Andrist:**

The fine for driving around a barrier? **Representative Heller:** Correct. **Representative**

Weiler: If I can get clarification? The Senate accede to the House amendments meaning that the only item in this bill is the fine for going around a barrier which is subsection 2, and its \$100 instead of \$250. **Representative Heller:** That is correct. **Representative Weiler:**

Subsection 3 is taken out, is that correct? **Representative Heller:** Yes. **Representative**

Weiler: I 2nd that.

Chairman Andrist: I have a second. **Senator Dotzenrod:** I guess I would like to see that motion made in two parts. I'd like to see us vote. I think it probably is a good thing to really see the Senate amendment or to accept it with what the House did. But I would like to try to see what happens if we could vote on it with the \$250. So I don't know if we could separate that motion into the two parts. **Representative Weiler:** There's been a motion and a 2nd, so if the motion fails, then there would be another option for another motion. I believe that's right. **Representative Delmore:** I think the point was made pretty clearly by the chairman when we began that \$250 did pass both Houses. The bill has been passed in both chambers it's just to define now what the best solution is. **Chairman Andrist:** And that's the portion that troubles me. I wouldn't quarrel with a fee of up to \$250.00 to provide some discretion but I hate to at this point. You talked about what the House will accept I have to worry about what the Senate will accept too. The Senate felt really, really strong about driving around barriers, being in reckless disregard for public safety. I feel equally confident of Rep. Weiler, that portion of it would not fly in the Senate. Taking away that Section 2 is going to be kind of difficult. **Chairman Andrist:** Any further discussion on the motion?

Roll call vote: 2 Yeas, 4 No 0 Absent. Motion has failed.

Chairman Andrist: Let me ask at this point. The magic hour has come and I don't have anything until 10:30, would you like to continue or do some other members have another conference committee? We'll continue. **Representative Weiler:** I move and, I had better not make that motion because I may not. **Chairman Andrist:** I don't think you would be precluded from making a motion. I was upset that there was nobody speaking for the conference committee report.

Senator Dotzenrod: Would you like to make a motion? Yes, Mr. Chairman, I move that the Senate recede to the House amendments. **Representative Delmore:** 2nd. **Chairman Andrist:** What this effectively does is remove the violation for anything other than driving around a barrier.

Further discussion.

Representative Weiler: Just to make it clear, that it is the original way it came across, no points and it's just the \$250 fine for driving around a barrier. **Chairman Andrist:** Yes. **Representative Heller:** I guess I won't support this because I think \$250 is a drastic increase from \$20 after talking to other House members. I mean if it somehow passes out of here, I won't support it on the floor that I was in agreement with conference committee and I will just tell you that right now. **Chairman Andrist:** I am under the impression that the Senate accedes to the House amendment that it won't come back to the floor. **Representative Weiler:** As a point of order, the motion has been made and seconded that the Senate accede to the House amendments and we obviously need to vote on this. If we vote this down what happens? My point is do we #1 do we have to vote on this and I believe we do, #2 a reminder that there still has to be an approval of the conference committee report on the floor. **Chairman Andrist:** Rep. Weiler, I am going to tell you what I think happened, but I am not positive. If we reject this report it would be my intention to recess the conference committee, go back and ask our body to reconsider the action by which we did not concur with the House amendments and to concur with the House

amendments and then I don't figure it would come back to the House. I am not sure of that, I have to check my territory.

Representative Weiler: Well Mr. Chairman, I guess I would like to know for sure and I'll state my case as Rep. Delmore had mentioned earlier, there is some concern about driving around a barrier. There is some concern on that. I believe that the motion has already failed but the reason that there was an attempt to bring it down to \$100 is so that we could do something about driving around the barrier rather than just \$20. I have had several members of the House come to me after that vote and say that is just ridiculous, \$250 fine that's a huge jump. And so, I guess I have a real concern when this would go to the floor of the House in a conference committee report I know there are going to be people that are going to stand up and oppose this because it is a \$250 fine. Why the House passed it before, you know I guess I can't speak to that, but I know that there is a sentiment and a movement that maybe there was a mistake made and maybe we shouldn't pass it out with a \$250 fine. So, to move this along I would certainly support the motion by Senator Dotzenrod and we would probably have two votes from each side so that we could pass it out and see where it goes, but again I don't know that I could support that on the floor.

Chairman Andrist: At this point, I am going to ask that I think both sides look at this because we're dealing in strategy here. I see the role as a conference committee to defend what my body, or how my body voted. Clearly you don't see your role on the conference committee to do the same thing. I don't like the idea personally of conference committees injecting their own policy after their body has spoken. At least and this is a grey area I understand, at least your trading down or whatever then. I realize that has to become a part of it. But it would be my intention and at this point I think having heard I think quite clearly that the House is very dramatically different about this bill than the Senate is and the Houses' conferees would probably make an effort to kill the bill. I think it is my intention to first recess this meeting and ask my Senate conferees to consider voting no on the motion to find out if we can simply go to our body and concur with it. I think we'll end up with more than what we would if we amend the bill. I am just telling you this because I am an upfront person. I am not going to tell you one thing and do something else.

Representative Weiler: I take a little offense to the comment that the House conference committee did not come here to do what the rest of the body of the House asked us to do. Because the rest of the body of the House passed out a bill that had a \$250 fine for going around a barrier and that's it. And so we came here and we defended that. We met three times and it was the wishes of the Senate to continue to try to have that portion put back in the bill even though we said we didn't want that. Rather than meeting 6 or 7 times, we took it to the House floor for a vote and it failed. So I don't think that the House conference committee did not come here to not do what the House asked us to do.

Motion was for the Senate to accede to the House.

Roll Call Vote: 3 Yeas, 3 No 0 Absent

Chairman Andrist: Motion has failed. We will have to meet again. **Representative Weiler:** I think we will have to meet because, the Senate conference committee defeated the motion, you cannot take it back to the Senate floor and wish to concur because you just defeated the motion. I think we'll just have to meet again. I believe you stated earlier that you would take it to the floor and try to concur, but the motion out of the conference

committee is you guys defeated the motion to have the Senate accede to the House amendment. So I don't think you can actually take that there, because you haven't acceded to our amendments. **Chairman Andrist:** You may be right. I am not sure of my grounds here. I just want to be upfront and I think this is the best way to resolve it. I sense that there is a strong effort in the House to kill the bill so I just want to find out where we're at. **Representative Weiler:** Again, there is not a strong will in the House to kill the bill. **Chairman Andrist:** We only got 11 votes on a reasonable compromise that we thought that 5 of the 6 of us agreed on. **Representative Weiler:** We got 11 votes in the House because of Subsection 3. **Chairman Andrist:** Well, we'll meet again.

April 14, 2011.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2157

That the House recede from its amendments as printed on page(s) 1022 of the Senate Journal and page(s) 1051 of the House Journal and that engrossed Senate Bill No. 2157 be amended as follows:

Page 1, line 2, remove "and a new paragraph to subdivision a of subsection 3 of section 39-06.1-10"

Page 1, remove lines 13 through 16

Page 1, line 17, replace "3." with "2."

Page 2, line 3, overstrike "knowingly" and insert immediately thereafter "willfully"

Page 2, line 6, replace "knowingly" with "willfully"

Page 2, remove lines 9 through 14

Renumber accordingly

2011 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Senate Political Subdivisions

Bill/Resolution No. 2157 as (re) engrossed

Date: 4-14-2011

Roll Call Vote #: 1

- Action Taken**
- SENATE accede to House amendments
 - SENATE accede to House amendments and further amend
 - HOUSE recede from House amendments
 - HOUSE recede from House amendments and amend as follows

Senate/House Amendments on (S)HJ page(s) 1022

- Unable to agree, recommends that the committee be discharged and a new committee be appointed

((Re) Engrossed) 2157 was placed on the Seventh order of business on the calendar

Motion Made by: Rep. Belmore Seconded by: Senator Laffen

Senators				Yes	No		Representatives				Yes	No
	4-7	4-12	4-14					4-7	4-12	4-14		
<u>Sen. Andrust</u>	✓	✓	✓	✓			<u>Rep. Weiler</u>	✓	✓	✓		✓
<u>Sen. Laffen</u>	✓	✓	✓	✓			<u>Rep. Heller</u>	✓	✓	✓	✓	
<u>Sen. Skaggs</u>	✓	✓	✓	✓			<u>Rep. Belmore</u>	✓	✓	✓	✓	

Vote Count: Yes 5 No 1 Absent 0

Senate Carrier Sen. Andrust House Carrier Rep. Weiler

LC Number _____ of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

2011 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Senate Political Subdivisions

Bill/Resolution No. 2157 as (re) engrossed

Date: 4-15-2011

Roll Call Vote #: _____

- Action Taken**
- SENATE accede to House amendments
 - SENATE accede to House amendments and further amend
 - HOUSE recede from House amendments
 - HOUSE recede from House amendments and amend as follows

Senate/House Amendments on SJ/HJ page(s) _____

- Unable to agree, recommends that the committee be discharged and a new committee be appointed

((Re) Engrossed) 2157 was placed on the Seventh order of business on the calendar

Motion Made by: _____ Seconded by: _____

Senators	4/15			Yes	No		Representatives	4/15			Yes	No
<i>Senator Andrus</i>							<i>Representative Weiler</i>					
<i>Senator Luffen</i>							<i>Representative Heller</i>					
<i>Senator Obegard</i>							<i>Representative Nelson</i>					

Vote Count: Yes _____ No _____ Absent _____

Senate Carrier _____ House Carrier _____

LC Number _____ of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

2011 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Senate Political Subdivision

Bill/Resolution No. 2157 as (re) engrossed

Date: 4-19-2011

Roll Call Vote #: 2

Action Taken

- SENATE accede to House amendments
- SENATE accede to House amendments and further amend
- HOUSE recede from House amendments
- HOUSE recede from House amendments and amend as follows

Senate/House Amendments on SJ/HJ page(s) _____

- Unable to agree, recommends that the committee be discharged and a new committee be appointed

((Re) Engrossed) _____ was placed on the Seventh order of business on the calendar

Motion Made by: Rep. Heller Seconded by: Rep. Weiler

Senators										Representatives					Yes	No
<u>Sen. Andriat</u>										<u>Rep. Weiler</u>						✓
<u>Sen. Saffin</u>										<u>Rep. Heller</u>						✓
<u>Sen. St. George</u>										<u>Rep. Delmae</u>						✓

Vote Count: Yes _____ No _____ Absent _____

Senate Carrier _____ House Carrier _____

LC Number _____ of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

SB 2157, as engrossed: Your conference committee (Sens. Andrist, Laffen, Dotzenrod and Reps. Weiler, Heller, Delmore) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ page 1022, adopt amendments as follows, and place SB 2157 on the Seventh order:

That the House recede from its amendments as printed on page 1022 of the Senate Journal and page 1051 of the House Journal and that Engrossed Senate Bill No. 2157 be amended as follows:

Page 1, line 2, remove "and a new paragraph to subdivision a of subsection 3 of section 39-06.1-10"

Page 1, line 3, remove "and demerit points"

Page 1, remove lines 12 through 15

Page 2, line 3, overstrike "knowingly" and insert immediately thereafter "willfully"

Page 2, line 6, replace "knowingly" with "willfully"

Page 2, remove lines 9 through 14

Renumber accordingly

Engrossed SB 2157 was placed on the Seventh order of business on the calendar.

2011 TESTIMONY

SB 2157

SENATE POLITICAL SUBDIVISIONS COMMITTEE**January 20, 2011 — 9 a.m. — Red River Room****North Dakota Department of Transportation
Francis G. Ziegler, Director****SB 2157**

Mr. Chairman and members of the committee, my name is Francis Ziegler and I am the Director of the North Dakota Department of Transportation (NDDOT). I'm here today in support of SB 2157.

During inclement weather the NDDOT and the Highway Patrol (HP) work together to inform the traveling public of travel conditions to assure their safety. We use a three-tiered approach to warn motorists of winter weather road conditions.

- The first is a Travel Alert which is issued to warn motorists that areas of challenging winter weather driving conditions may be encountered. Conditions are such that motorists can still travel, but they need to be alert to changing conditions that may cause reduced speed or visibility.
- If conditions deteriorate a Travel Alert is changed to a No Travel Advisory. This is issued when conditions warrant no travel but not a road closure. No Travel Advisories are issued for public safety to encourage motorists not to venture out onto the roads. Because conditions change often during a storm event, motorists could become stranded if they are caught between destinations. Motorists are urged to take No Travel Advisories seriously as these advisories have a potential to change to a road closure if conditions deteriorate.
- The third level is a Road Closure. Roads are closed when conditions become so bad they create a life-threatening danger to motorists.

Motorists who choose to ignore a road closure put themselves at risk, and when they become stranded they put others at risk. The HP, usually accompanied by a NDDOT snow plow, makes every effort to rescue stranded motorists. Quite often that very effort puts those individuals at significant risk. It also hinders the efficient removal of snow to reopen the closed road, because the stranded vehicles must be removed by towing services before the snow removal can continue.

In the most recent blizzard that occurred around New Year's Eve, I-94 was eventually closed from Bismarck to Fargo and I-29 was closed from the South Dakota line to the Canadian border. Portions of the interstate were closed for almost three days. During that time it was reported frequently that the road was closed. Our travel information map showed the road as being closed. During that time the HP issued citations for drivers who drove on the closed interstate system and transported over 60 motorists to safety.

NDDOT personnel transported an additional 32 motorists to safety after finding them during road opening operations. Many admitted they had driven around the gates in an effort to get to their destination. This delayed the road opening, as they had to transport these individuals to a safe location and wait until tow trucks could remove the vehicles before the snow plow operations could resume.

I'm not testifying as to what the fine should be. I am testifying that the statute we have in place today is not deterring motorists from ignoring the road closures. The costs for the rescue operation, for the delay of getting the roads opened and for the delay to other drivers waiting for the road to open, is a big cost to the economy that should not be ignored. That concludes my testimony. I'd be happy to answer any questions the committee may have.

Olafson, Curtis

From: Olafson, Curtis
Sent: Friday, January 21, 2011 7:55 AM
To: Dawson, Tim J.
Cc: Heckaman, Joan M.
Subject: SB 2157 amendments

Mr. Dawson,

I understand that you drafted 2157 for Sen. Heckaman. The Pol Subs committee asked me to have amendments drafted for the bill. We are meeting this morning to consider action on the bill. I apologize for the short notice and do not expect you to draft amendments immediately. I can present my ideas to the committee without an amendment draft in front of us.

Here is what we discussed:

1. A \$250 fine for (knowingly?) driving around a road closed barrier when closed due to weather conditions + 4 point license demerit
2. A \$100 fine for driving on a road that has been announced by law enforcement as being closed and the driver has not actually driven around a road closed barrier + 2 point license demerit
3. Senator Lyson had some amendments drafted specifying that motorists be held responsible for the costs of rescue and retrieval as a result of traveling on a closed road. I don't have the amendment or its number in front of me.

I would appreciate it if you could reply and give me a projection on when these might be ready. Thanks for all do!

Senator Curtis Olafson
District 10
13041 84th St NE
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colafson@nd.gov
colafson@polarcomm.com

SENATE BILL NO. 2157

Introduced by

Senators Heckaman, Andrist, Nodland

Representatives Devlin, Guggisberg, Klein

1 A BILL for an Act to create and enact two new subdivisions to subsection 2 of
2 section 39-06.1-06 and a new paragraph to subdivision a of subsection 3 of section 39-06.1-10
3 of the North Dakota Century Code, relating to the fee and demerit points for entering a road
4 closed due to hazardous conditions; to amend and reenact section 39-10-21.1 of the North
5 Dakota Century Code, relating to entering a closed road; and to provide a penalty.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1.** Two new subdivisions to subsection 2 of section 39-06.1-06 of the
8 North Dakota Century Code is created and enacted as follows:

9 A violation of subsection 3 of section 39-10-21.1, a fee of one hundred dollars.

10 A violation of subsection 2 of section 39-10-21.1, a fee of two hundred fifty
11 dollars.

12 **SECTION 2.** A new paragraph to subdivision a of subsection 3 of section 39-06.1-10 of the
13 North Dakota Century Code is created and enacted as follows:

14 Entering a closed road in violation of subsection 2 of 4 points
15 section 39-10-21.1

16 **SECTION 3. AMENDMENT.** Section 39-10-21.1 of the North Dakota Century Code is
17 amended and reenacted as follows:

18 **39-10-21.1. Closing road because of hazardous conditions. Posting of official**
19 **traffic-control devices - Entering closed road prohibited.**

20 1. The highway patrol or local law enforcement authorities, having jurisdiction over a road,
21 may close a road temporarily due to hazardous conditions for the protection and safety
22 of the public. If such a closing is made, the authority ordering the closing shall make

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every reasonable attempt to notify the public and, when practical, may post appropriate official traffic control devices to advise motorists of the closing. He shall

2. An individual while operating a motor vehicle may not knowingly enter a road closed under this section which is posted with an appropriate traffic control device at the point of entry.

3. An individual while operating a motor vehicle may not knowingly enter a road that is closed through reasonable public notification by law enforcement in a manner which is not posted with an appropriate traffic control device at the point of entry.

4. The highway patrol or local law enforcement having jurisdiction over a road may require an individual to pay the expenses of the law enforcement agency which provided assistance to that individual if that individual has been cited for a violation of subsection 2 and was assisted by that law enforcement agency. The law enforcement agency may retain and hold a possessory lien in any vehicle used in relation to a violation for a violation of subsection 2.

SENATE POLITICAL SUBDIVISIONS COMMITTEE
January 20, 2011 — 9 a.m. — Red River Room

North Dakota Department of Transportation
Francis G. Ziegler, Director

SB 2157

Mr. Chairman and members of the committee, my name is Francis Ziegler and I am the Director of the North Dakota Department of Transportation (NDDOT). I'm here today in support of SB 2157.

During inclement weather the NDDOT and the Highway Patrol (HP) work together to inform the traveling public of travel conditions to assure their safety. We use a three-tiered approach to warn motorists of winter weather road conditions.

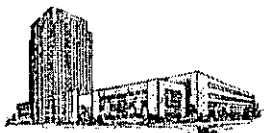
- The first is a Travel Alert which is issued to warn motorists that areas of challenging winter weather driving conditions may be encountered. Conditions are such that motorists can still travel, but they need to be alert to changing conditions that may cause reduced speed or visibility.
- If conditions deteriorate a Travel Alert is changed to a No Travel Advisory. This is issued when conditions warrant no travel but not a road closure. No Travel Advisories are issued for public safety to encourage motorists not to venture out onto the roads. Because conditions change often during a storm event, motorists could become stranded if they are caught between destinations. Motorists are urged to take No Travel Advisories seriously as these advisories have a potential to change to a road closure if conditions deteriorate.
- The third level is a Road Closure. Roads are closed when conditions become so bad they create a life-threatening danger to motorists.

Motorists who choose to ignore a road closure put themselves at risk, and when they become stranded they put others at risk. The HP, usually accompanied by a NDDOT snow plow, makes every effort to rescue stranded motorists. Quite often that very effort puts those individuals at significant risk. It also hinders the efficient removal of snow to reopen the closed road, because the stranded vehicles must be removed by towing services before the snow removal can continue.

In the most recent blizzard that occurred around New Year's Eve, I-94 was eventually closed from Bismarck to Fargo and I-29 was closed from the South Dakota line to the Canadian border. Portions of the interstate were closed for almost three days. During that time it was reported frequently that the road was closed. Our travel information map showed the road as being closed. During that time the HP issued citations for drivers who drove on the closed interstate system and transported over 60 motorists to safety.

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I'm not testifying as to what the fine should be. I am testifying that the statute we have in place today is not deterring motorists from ignoring the road closures. The costs for the rescue operation, for the delay of getting the roads opened and for the delay to other drivers waiting for the road to open, is a big cost to the economy that should not be ignored. That concludes my testimony. I'd be happy to answer any questions the committee may have.



NORTH DAKOTA SENATE

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



#1

Senator Joan Heckaman
District 23
322 2nd Avenue North
New Rockford, ND 58356-1712
jheckaman@nd.gov

COMMITTEES:
Agriculture
Education

March 17, 2011

Mr. Chairman and Members of the Committee:

I am Senator Joan Heckaman from New Rockford and I represent District 23 which is all of Nelson and Griggs counties and parts of Eddy, Benson, and Steele counties.

I am here this morning to introduce SB 2157 to you. This is known as "Going around the barrier bill". This bill began because of an issue one of my constituents had about people driving during inclement weather without their vehicle lights on. In conversation with law enforcement, the conversation moved to the earlier closure of I-29 and I-94 over the holidays due to low visibility and blocked roads. I found out that the fine for driving around a barrier is currently \$20. The original bill drafted raised the fine to \$100 and 2 points on your driver's license.

We have had other instances of road closures this winter, none more devastating than the past weekend. Now most of those individuals caught in that fast moving storm did not go around the barrier, but it still points to the issue of DANGER and COST.

1. Danger to the drivers themselves and to other drivers on the road
2. Danger to rescuers who in some rural areas are on a completely volunteer basis
3. Danger to the plow operators who open roads for emergency vehicles
4. Cost to move drivers and passengers to safety
5. Cost to remove stranded vehicles off the road

Right now we are only thinking about this bill in terms of snow and cold weather. But if this bill passes, it will also address the issue of individuals driving around barriers in floods or when roads are impassible due to high water. I encountered this last session when returning to Bismarck from home. I came over a hill on Highway 200 and saw water running across the road. There was no barrier. There was no flashing light. So I thought the water was shallow. Well, it wasn't shallow. I had slowed down. I believe I entered the water at about 35 mph. Immediately the water sheeted over the top of my car. I could almost feel my car moving with the flow of the water to the north side of the road. I still don't know how I got through, but I did. And then I had no cell service. So I drove until I came to a small town and stopped at a store. I had the person there call the Sheriff. That road was closed, but it was a very dangerous time until emergency people got there to do that. This bill will also address issues of water. That will be important in the coming months.

I'm not sure why people drive around barriers. But in the winter it may be due to our secure feeling we get from our cell phones and On Star features on our vehicles. I have heard how important cell phones were last weekend. It may be due this year to the extensive snow pack we have. Normal vegetation that keeps snow from blowing is covered up. When the wind blows, so does everything else. Tree claims or shelter belts are being torn out because they have well outlived their usefulness. Whatever the reason, we need to increase the penalty for going around barriers. It seems the current \$20 fine is only a slap on the hands.

FEATURES OF THE BILL:

Page 1 line 9- This violation is for individuals who access a closed road from a location where there is no barrier. The fine is \$100.

The rationale for this section is that all of us have access to some form of communication notifying us of road closures and bad weather. These communications can come from calling 511, listening to the radio, watching TV, using the DOT travel information map, or calling local law enforcement.

Page 1 line 10-This violation is for deliberately going around a barrier and accessing a closed road or highway. The fine is \$250 and on page 1, line 14, also adds a 4 point penalty on your driver's license.

Also amended into the bill in the Senate was another penalty clause on page 2, line 9. This allows the law enforcement to hold a vehicle until expenses related to the rescue of the individual is paid. Senator Lyson will explain this section of the bill further in his testimony.

ATTACHED AMENDMENT:

The attached amendment is at the request of stakeholders. We want to make sure this bill does not apply to emergency or utility organizations that are very important during emergency situations. That is the reason for the exemption listed on this amendment. And also the emergency clause would put this legislation into effect as soon as it is signed by the Governor. That will be important as we enter this time of possible flooding.

I hope this bill generates some good discussion in this committee and I ask you to give it favorable consideration.

That concludes my testimony and I would stand for any questions I may be able to answer.

March 15, 2011

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2157

Page 1, line 5, remove "and"

Page 1, line 5, after "penalty" insert "; and to declare an emergency"

Page 2, after line 14, insert:

"5. This section does not apply to class A, class B, or class C authorized emergency vehicles or vehicles operated by utility organization personnel responding to critical or emergency situations.

SECTION 4. EMERGENCY. This Act is declared to be an emergency measure."

Re-number accordingly

#2

PROPOSED AMENDMENT TO SB-2157

ON PAGE TWO, LINE FIFTEEN –

ADD NEW SECTION 4

The provisions of this act do not apply to bona fide emergency or utility organization personnel responding to critical or emergency situations.

Renumber accordingly.

#3

HOUSE TRANSPORTATION COMMITTEE
March 17, 2011 — 11:00 a.m. — Fort Totten Room

North Dakota Department of Transportation
Darcy R. Rosendahl, Operations Director

SB 2157

Mr. Chairman and members of the committee, my name is Darcy Rosendahl and I am the Operations Director of the North Dakota Department of Transportation (NDDOT). I'm here today in support of SB 2157.

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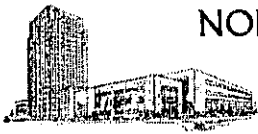
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NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Representative Lawrence R. Klemin
District 47
1709 Montego Drive
Bismarck, ND 58503-0856
lklemin@nd.gov

COMMITTEES:
Judiciary, Vice Chairman
Political Subdivisions

April 8, 2011

✓ TO: Clerk, Senate
Political
Subdivisions
Committee

TO: SB 2161 Conference Committee
Sen. Olafson
Sen. Andrist
Sen. Dotzenrod
Rep. Koppelman
Rep. Kretschmar
Rep. Kilichowski

FROM: Rep. Klemin

I was the bill carrier on SB 2161 in the House and explained the bill on the floor. Attached is a copy of my floor speech, which may be useful to the conference committee in reviewing the bill and the House amendments. SB 2161 was introduced to reverse the decision of the North Dakota Supreme Court in *Kappenman v. Klipfel and Albion Township*, 2009 ND 89. A copy of the case is also attached. The goal of SB 2161 is to save legal expenses for the North Dakota Insurance Reserve Fund (NDIRF), the entity that insures townships and other political subdivisions.

In the *Kappenman* case, the District Court had granted summary judgment to Klipfel and Albion Township, holding that there was no genuine issue as to any material fact and that the defendants were entitled to judgment as a matter of law dismissing the Kappenman wrongful death action for the loss of their minor son, Brason Kappenman, deceased. Brason had been killed while riding an ATV on an unimproved section line road when he rode into a washout which had formed a trench across the section line. The disposition of the case by the Supreme Court turned on whether there was a duty on the part of the township to warn travelers on section line roads of hazardous conditions. If there was no duty to warn, then there was no actionable negligence.

As noted in the *Kappenman* case, summary judgment is a procedural device that is used to dispose of cases in advance of a full trial on the merits in those cases where there is no genuine issue as to any material fact and where a decision can be made as a matter of law. In that situation, there is no need for a trial. The purpose of a trial is to determine what the facts are so that the law can be applied to the facts. The "factfinder" is either the trial judge in a bench trial, or the jury in a jury trial. The amount that an insurer, such as NDIRF, must pay in attorney fees to defend a case is substantially less if the case can be decided on a motion for summary judgment, rather than going through a full jury trial on the merits. Jury trials are expensive.

The Supreme Court held that whether a duty exists is generally a question of law, meaning that the case can be decided on a motion for summary judgment (lower attorney fees for NDIRF). However, if the existence of a duty depends on the resolution of factual issues, then the facts must be resolved by the trier of fact, meaning that a trial is required (higher attorney fees for NDIRF).

In the *Kappenman* case, the Supreme Court held, as a matter of law, that a township board "with actual knowledge" of an unusually dangerous or unusually hazardous condition on an unimproved section line road has a duty to warn travelers of that condition. The court explained that an "unusually dangerous" or "unusually hazardous" condition on a section line road is one so peculiarly dangerous that there is a substantial risk that a person exercising ordinary care and driving within the limits of the law could not drive on that part of the road safely. The question then is whether the township board had "actual knowledge" of the hazardous condition. This is a jury question. However, constructive knowledge is not enough to give rise to the duty to warn.

SB 2161, as originally introduced, provided in Section 2 (page 1, lines 18-19) that a political subdivision is not liable for any claim based on a naturally occurring hazard on a congressional section line. Thus, SB 2161 reverses the Supreme Court, which held that there was a duty to warn if the township board had actual knowledge of the hazard. Under SB 2161, the township would not be liable even if it had actual knowledge. Therefore, a case like the *Kappenman* case could be decided on a motion for summary judgment (less expensive) without the need for a jury trial (more expensive), if it can be shown that the washout across the section line was a naturally occurring hazard. The township is granted absolute immunity from liability for naturally occurring hazards on section line roads and has no duty to warn travelers, even if the condition is "unusually hazardous" and even if the township board has "actual knowledge" of the "unusually hazardous" condition.

The House thought that the grant of absolute immunity from liability to political subdivisions for claims based on naturally occurring hazards on section line roads set out in SB 2161 went too far. The duty to warn determined by the Supreme Court depended on whether the hazardous condition was "unusually hazardous", which was further defined as whether it was so "peculiarly dangerous" that it created a substantial risk to persons exercising ordinary care. I think that *Kappenman* was a well reasoned decision.

The House amendment to SB 2161, with respect to a naturally occurring hazard, is an effort to further define what an "unusually hazardous" condition is. In the view of the House, reference must be made to the surrounding topography and geological environment. The same condition in one part of the State may be "unusually hazardous", but may not be "unusually hazardous" in another part of the State.

The North Dakota Supreme Court has also held that although disputed fact questions ordinarily preclude summary judgment, if the evidence is such that reasonable minds could draw but one conclusion, the issue becomes one of law and summary judgment may be appropriate.

In my opinion, the House amendments on SB 2161 clarifying the potential liability of a political subdivision for claims based on naturally occurring hazards, provide limited immunity, rather than absolute immunity. Some cases can be decided on a motion for summary judgment under the limited immunity standard where "actual knowledge" becomes immaterial because the hazard is not "unusually dangerous" with reference to the condition of the surrounding area. In other cases, "actual knowledge" of an "unusually hazardous" condition will become a jury question. Our goal in passing our laws should be to best serve the public. Our objective in doing so should not be based on the cost of litigation to insurers.

SB 2161 Bill Carrier

Mr. Speaker and Members of the Assembly.

Sb 2161 relates to liability for obstructions and hazards on highways and streets and on unimproved section line roads.

Section 1 of the bill amends Section 24-06-31, which currently requires the removal of obstructions from a highway or public street. The amendment provides that this section does not apply to unimproved section line roads, which are covered in Section 2 of the bill.

Section 2 of the bill relates to congressional section line roads. In 1866, the United States made an offer of section line easements on public land in Dakota Territory. At that time, most of the land in Dakota Territory was public land. That offer was accepted in 1871 by the government of the Territory of Dakota when legislation was adopted stating that all section lines were declared to be public highways as far as practicable. In 1902, the North Dakota Supreme Court reviewed this issue and held that the rights of the public to section line highways and streets are easements to the extent of 33 feet on each side of the section line. The public has a right to travel on section lines but does not own them. The owner of the adjoining land owns the fee title to the property included in the 33 foot easement up to the section line. Under current North Dakota statutory law contained in Section 24-07-03, the congressional section lines are considered public roads open for public travel to the width of 33 feet on each side of the section lines.

Section 2 of the bill clarifies the extent of the potential liability of political subdivisions and the adjacent landowners for hazards on unimproved section line roads. It does not cover section line roads that have been improved or which are being maintained as roads. Section 2 limits the liability of political subdivisions for injuries to travelers on unimproved section line roads under certain circumstances.

The potential liability of political subdivisions for hazards on unimproved section line roads is limited and depends on whether the hazard is natural or manmade. Under subsection a.(1), if the hazard is a naturally occurring hazard, then the political subdivision is not liable for accidents which occur as a result of the hazard unless two things happen:

First, the political subdivision will not be liable unless it had actual knowledge of an unusually dangerous or unusually hazardous condition that a traveler would not reasonably expect to exist due to the nature of the surrounding topography or geological environment.

Second, a political subdivision that has actual knowledge of an unusually hazardous condition will not be liable unless it failed to warn travelers of that condition. For

example, in the Badlands, a traveler on a section line road should expect to encounter hazards due to the surrounding topography or geological environment. Hazards are not unusual in that part of the state. The same could be said of many other parts of the state. This section only applies where the hazard is so peculiarly dangerous given the surrounding area that there is a substantial risk that a person exercising due care could not travel safely on that part of the section line road. A political subdivision has no roving duty to inspect unimproved section line roads for possible hazards. A political subdivision could only be held liable if it had actual knowledge of an unusually dangerous hazard and failed to warn unsuspecting travelers.

Under subsection a.(2), if the hazard is manmade, the political subdivision is not liable unless it is served with notice of the manmade hazard by certified mail or otherwise has actual knowledge that the hazard exists, and the political subdivision either fails to take action to mitigate the hazard or fails to provide warning of the hazard within 10 days after service of the notice or after it has actual knowledge.

A manmade hazard could be such things as equipment left on the section line road, haybales, or other types of manmade hazards. A manmade hazard could also include a washout on a section line road that can't be seen by a traveler until too late if the washout is caused by something that an adjoining landowner did on his land. If the washout is not something caused by the conduct of an adjoining landowner, then it would be a natural hazard instead of a manmade hazard.

Subsection b provides that any person that causes or contributes to a hazard on a section line road may be liable for damages. Liability would be determined by the court or a jury in a civil action based on the proof presented to establish liability.

Subsection c provides that the political subdivision may issue an order directing the person that caused or contributed to a hazard on a section line to mitigate the hazard.

Mr. Speaker and members of the Assembly, your Political Subdivisions Committee, by a vote of 11 to 2 recommends "do pass" on SB 2161, and we ask the House to concur.

Alfred Kappenman and Julie Ness, aka Julie Kappenman, on behalf of their minor son, Brason Kappenman, deceased, and Alfred Kappenman and Julie Kappenman on behalf of the heirs and next-of-kin of Brason Kappenman, deceased, Plaintiffs and Appellants v. Brent Klipfel, and Albion Township, a political subdivision of the State of North Dakota, Defendants and Appellees
SUPREME COURT OF NORTH DAKOTA
2009 ND 89;765 N.W.2d 716;2009 N.D. LEXIS 96
No. 20080184
May 26, 2009, Filed

Editorial Information: Prior History

Appeal from the District Court of Dickey County, Southeast Judicial District, the Honorable John T. Paulson, Judge.

Disposition:

Counsel David R. Bliss, Larson Latham Bliss Huettl, LLP, Bismarck, N.D., for plaintiffs and appellants.

Carlton J. Hunke (argued) and Robert B. Stock (on brief), Vogel Law Firm, Fargo, N.D., for defendant and appellee, Brent Klipfel.

Randall J. Bakke, Smith Bakke Porsborg & Schweigert, Bismarck, N.D., for defendant and appellee, Albion Township.

Judges: Mary Muehlen Maring, Dale V. Sandstrom, James M. Bekken, D.J. I concur in the result. Daniel J. Crothers. Opinion of the Court by Maring, Justice. The Honorable James M. Bekken, D.J., sitting in place of Kapsner, J., disqualified. VandeWalle, Chief Justice, concurring.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant parents sought review of an order of the District Court of Dickey County, Southeast Judicial District (North Dakota), which granted summary judgment in favor of appellees, a township and a property owner, and dismissed their wrongful death action. Order granting summary judgment in favor of a township in parents' wrongful death action was reversed because discretionary function immunity under N.D. Cent. Code § 32-12.1-03(3) did not shield the township from liability if it had actual knowledge of an unusually dangerous or hazardous condition of the section line, as was alleged by the parents.

OVERVIEW: The parents' son was killed when the all terrain vehicle he was driving dropped into a washout forming a trench across a section line. The court determined that the parents alleged that the owner told two township board members that the section line was in a hazardous or dangerous condition and such allegation was sufficient to raise a genuine issue of material fact as to if the township had actual knowledge of an unusually dangerous or hazardous condition on the section line and thus, had a duty to warn or maintain the road. Discretionary function immunity under N.D. Cent. Code § 32-12.1-03(3) did not shield the township from liability if it had actual knowledge of an unusually dangerous or hazardous condition of the section line. Because the section line was a public road under N.D. Cent. Code § 24-07-03 the court held that the recreational use immunity statutes, N.D. Cent. Code ch. 53-08, did not apply. The owner was properly dismissed because there was no evidence to suggest that he caused or contributed

to the condition of the washout. Because the township might have had a duty to warn, the nuisance action under N.D. Cent. Code § 42-01-01 should not have been dismissed.

OUTCOME: The court affirmed the order with regard to the owner, reversed the order with regard to the township, and remanded the matter for further proceedings.

LexisNexis Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants
Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants
Civil Procedure > Summary Judgment > Standards > General Overview
Civil Procedure > Appeals > Standards of Review > De Novo Review

Summary judgment under N.D. R. Civ. P. 56(c) is a procedural device for the prompt and expeditious disposition of any action without a trial if either litigant is entitled to judgment as a matter of law and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving factual disputes will not alter the result. Whether the district court properly granted a summary judgment motion is a question of law that an appellate court reviews de novo on the record. The party moving for summary judgment must show no genuine issues of material fact exist and the case is appropriate for judgment as a matter of law. In determining whether summary judgment was appropriately granted, an appellate court views the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of all favorable inferences which can reasonably be drawn from the record. However, under N.D. R. Civ. P. 56, if the movant meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury
Torts > Negligence > Duty > General Overview

If no duty exists on the part of an alleged tortfeasor, there is no actionable negligence. Whether a duty exists is generally a question of law, but if the existence of a duty depends upon the resolution of factual issues, the facts must be resolved by the trier of fact.

Governments > Local Governments > Duties & Powers
Governments > Public Improvements > Bridges & Roads
Transportation Law > Commercial Vehicles > Bridges & Roads

Congressional section lines are considered public roads open for public travel. N.D. Cent. Code § 24-07-03. N.D. Cent. Code § 24-06-01 provides that the board of township supervisors of any township in the state has general supervision over the roads, highways, and bridges throughout the township. A public road, as contemplated by N.D. Cent. Code § 24-07-03, does not impose a duty on a county or township to maintain an improved road on the section line. A county or a township does not have a duty to maintain an improved road on each section line, nor can a county or a township be held legally liable for injuries to persons using a portion of a designated public road which the county or township has not undertaken to improve.

Governments > Local Governments > Duties & Powers
Governments > Public Improvements > Bridges & Roads
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Warn

***Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Known Dangers
Transportation Law > Commercial Vehicles > Bridges & Roads***

Although a township has no duty to maintain an improved road on each section line, there is a duty to erect barriers or railings along highways and roads to make the way safe from hazardous or dangerous conditions for travelers using ordinary care. Because a township has no duty under the law to maintain an improved road on each section line, a township does not have a roving duty to inspect every unimproved and un-vacated section line for possible natural and man-made obstructions. However, because a township is charged with the general supervision over roads throughout the township, a township board cannot simply ignore hazardous or dangerous section line road conditions of which it has knowledge. A township board with actual knowledge of an unusually dangerous or unusually hazardous condition on an unimproved section line road has a duty to warn travelers of that condition. An unusually dangerous or unusually hazardous condition on a section line road is one so peculiarly dangerous there is a substantial risk that a person exercising ordinary care and driving within the limits of the law could not drive on that part of the road safely. Constructive knowledge is insufficient to give rise to the duty. Actual knowledge given to at least one member of the township board is sufficient to impose the duty.

***Governments > Local Governments > Claims By & Against
Torts > Public Entity Liability > Liability > State Tort Claims Acts > Employees
Torts > Public Entity Liability > Liability > State Tort Claims Acts > Exclusions From Liability***

A political subdivision is exempt under N.D. Cent. Code § 32-12.1-03(3) from liability for an act or omission of its employees who are performing discretionary functions or duties. There is a two-part inquiry when determining whether the discretionary function exception applies: (1) whether the conduct at issue is discretionary, involving an element of judgment or choice for the acting employee; and (2) if the act is discretionary, whether that judgment or choice is of the kind the discretionary function exception was designed to shield. The primary focus of the second part of the test is on the nature of the actions taken and on whether they are susceptible to policy analysis.

***Governments > Local Governments > Duties & Powers
Governments > Public Improvements > Bridges & Roads
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Warn
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Known Dangers
Transportation Law > Commercial Vehicles > Bridges & Roads***

Under N.D. Cent. Code § 24-06-01, the township has general supervision over the roads throughout the township. A township board with actual knowledge of an unusually dangerous or unusually hazardous condition on a section line road has a duty to warn travelers of that condition.

***Governments > Local Governments > Claims By & Against
Governments > Local Governments > Duties & Powers
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Maintain
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Warn
Torts > Public Entity Liability > Liability > State Tort Claims Acts > Exclusions From Liability***

Discretionary function immunity does not shield governmental entities from failing to repair or warn against known hazards on roadways under their control because the failure to repair or warn against the

dangerous condition does not involve the exercise of social, economic, or political policy.

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Bridges & Roads

Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Warn

***Torts > Public Entity Liability > Liability > State Tort Claims Acts > Exclusions From Liability
Transportation Law > Commercial Vehicles > Bridges & Roads***

Failing to warn of an unusually dangerous or unusually hazardous condition in a road implicates no social, economic, or political policies. Undue emphasis on economic considerations would permit discretionary function immunity to cover all government decision-making because budgetary constraints underlie virtually all governmental activity.

Torts > Premises Liability & Property > General Premises Liability > Premises > Recreational Facilities > Recreational Use Statutes

The proper analysis in deciding whether to apply the recreational use immunity statutes, N.D. Cent. Code ch. 53-08, must include consideration of the location and nature of the injured person's conduct when the injury occurs.

Governments > Public Improvements > Bridges & Roads

Transportation Law > Commercial Vehicles > Bridges & Roads

N.D. Cent. Code § 24-07-03 provides that in all townships in the State of North Dakota, outside the limits of incorporated cities, and outside platted townsites, additions, or subdivisions, the congressional section lines are considered public roads open for public travel to the width of 33 feet on each side of the section lines.

Governments > Legislation > Interpretation

The interpretation of a statute is a question of law. This Supreme Court of North Dakota's primary objective in interpreting a statute is to ascertain legislative intent. Words of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. N.D. Cent. Code § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D. Cent. Code § 1-02-07. If the language of a statute is clear and unambiguous, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit. N.D. Cent. Code § 1-02-05. If the language of a statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute. N.D. Cent. Code § 1-02-39. Statutes must be construed to avoid absurd and ludicrous results.

Torts > Premises Liability & Property > General Premises Liability > Duties of Care > Duty on Premises > General Overview

Torts > Premises Liability & Property > General Premises Liability > Premises > Recreational Facilities > Recreational Use Statutes

North Dakota's recreational use immunity statutes were enacted to encourage landowners to open their land for recreational purposes by giving them immunity from suit under certain circumstances. Under N.D. Cent. Code § 53-08-02, an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes.

Torts > Premises Liability & Property > General Premises Liability > Duties of Care > Duty on Premises > General Overview

Torts > Premises Liability & Property > General Premises Liability > Premises > Recreational

Facilities > Recreational Use Statutes

See N.D. Cent. Code § 53-08-03.

***Torts > Premises Liability & Property > General Premises Liability > General Overview
Torts > Premises Liability & Property > General Premises Liability > Premises > Recreational
Facilities > Recreational Use Statutes***

Land is defined as including all public and private land, roads, water, watercourses, and ways and buildings. N.D. Cent. Code § 53-08-01(2). Owner is defined as including tenant, lessee, occupant, or person in control of the premises. N.D. Cent. Code § 53-08-01(3). Recreational purposes is defined as including any activity engaged in for the purpose of exercise, relaxation, pleasure, or education. N.D. Cent. Code § 53-08-01(4). N.D. Cent. Code § 53-08-05(1) provides that the chapter does not limit in any way any liability that otherwise exists for willful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

***Governments > Public Improvements > Bridges & Roads
Torts > Premises Liability & Property > General Premises Liability > Premises > Recreational
Facilities > Recreational Use Statutes
Transportation Law > Commercial Vehicles > Bridges & Roads***

Although N.D. Cent. Code § 53-08-01(2) includes public roads in the definition of land, the North Dakota Legislature did not intend to relieve government entities of their duties as supervisors of roads under all circumstances because public roads are primarily opened for purposes of travel, not recreation.

***Governments > Public Improvements > Bridges & Roads
Real Property Law > Limited Use Rights > Easements > Public Easements
Transportation Law > Commercial Vehicles > Bridges & Roads***

In North Dakota the rights of the public to section line highways and to streets are easements only, limited to the right to travel and other rights incident thereto, and the owner of the adjoining land owns the fee title to the property included in the 33 foot easement up to the section line.

***Governments > Public Improvements > Bridges & Roads
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty
to Maintain
Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty
to Warn
Torts > Premises Liability & Property > General Premises Liability > Duties of Care > Duty on
Premises > Reasonable Care
Transportation Law > Commercial Vehicles > Bridges & Roads***

A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care (a) to maintain the highway or way in safe condition for their use, or (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover. The possessor of land over which there is a public highway is subject to liability for physical harm caused to travelers thereon by a failure to exercise reasonable care in creating or maintaining in reasonably safe condition any structure or other artificial condition created or maintained in the highway by him or for his sole benefit subsequent to its dedication.

***Governments > Public Improvements > Bridges & Roads
Torts > Premises Liability & Property > General Premises Liability > Duties of Care > Duty on***

**Premises > Reasonable Care
Transportation Law > Commercial Vehicles > Bridges & Roads**

See N.D. Cent. Code § 47-01-23.

Real Property Law > Torts > Nuisance > Elements

See N.D. Cent. Code § 42-01-01.

Real Property Law > Torts > Nuisance > Types > Public Nuisance

A public nuisance is one which at the same time affects an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal. N.D. Cent. Code § 42-01-06. A civil action is a remedy against a public nuisance, N.D. Cent. Code § 42-01-07(4), and a private person may maintain an action for a public nuisance if it is specially injurious to that person or that person's property, but not otherwise. N.D. Cent. Code § 42-01-08. Whether a nuisance exists is a mixed question of fact and law. Nuisance requires proof of an unlawful act or the failure to perform a duty. N.D. Cent. Code § 42-01-01.

Real Property Law > Torts > Nuisance > General Overview

Breach of a duty sounding in tort will give rise to an action based upon nuisance, and proof of a violation of a statutory duty is not necessary.

Governments > Local Governments > Duties & Powers

Governments > Public Improvements > Bridges & Roads

Torts > Premises Liability & Property > General Premises Liability > Dangerous Conditions > Duty to Warn

Transportation Law > Commercial Vehicles > Bridges & Roads

A township has a duty to warn if it has actual knowledge of an unusually dangerous or unusually hazardous condition on an unimproved section line road.

Opinion

Opinion by: Mary Muehlen Maring

Opinion

{765 N.W.2d 718} Maring, Justice.

P1 Alfred Kappenman and Julie Ness, on behalf of their deceased son, Brason Kappenman, appeal from judgments dismissing their wrongful death action against Brent Klipfel and Albion Township. We conclude the district court erred in granting summary judgment dismissing Albion Township from the action, but did not err in dismissing Klipfel from the action. We affirm in part, reverse in part, and remand for further proceedings.

|

P2 On August 1, 2006, Brason Kappenman was killed when the all terrain vehicle ("ATV") he was driving dropped into a washout which had formed a trench across a section line in Albion Township in Dickey County. Brason Kappenman, who was 13 years-old at the time, had been mowing hay on one

of his father's fields by himself after Alfred Kappenman had to leave the farm for an appointment in Aberdeen, South Dakota. Brason Kappenman told his father "[h]e wanted to go look around to see where to put a deer stand," and Alfred Kappenman told him, "[i]f things break down . . . just go and do that."

P3 Brason Kappenman worked that afternoon in a field located about two miles {765 N.W.2d 719} directly north of the Kappenman farmstead, which is 12 miles northwest of Ellendale. The tractor quit running while Brason Kappenman was mowing hay so he left on the ATV he had driven to the field to go back to the farmstead and began looking for a spot to place a deer stand. Brason Kappenman ultimately drove on the section line and into the trench. The trench is located two and one-half miles west and one mile north of the farmstead, and the trench was surrounded by tall grass and small rocks. The trench was four and one-half feet wide, three feet deep, and between fifteen and eighteen feet long. According to Alfred Kappenman, he noticed skid marks leading to the trench indicating Brason Kappenman had attempted to turn away from the trench. The Dickey County Sheriff's Office incident report noted the washout "was hard to see until you were right on it." After the accident, Albion Township placed a "road closed" sign on the section line.

P4 Brent Klipfel owns the land on both sides of the section line where the accident occurred. Klipfel said the section line is used by farmers to access their farmland, and he has noticed up to "seven to ten" vehicles on the road per day during hunting season. The sections of land have natural waterways that meander and cross the scene of the accident. Klipfel cleaned the waterways in 2004 or 2005 when they silted up with tillage. The severity of the trenches varies from year to year depending on the weather. According to Klipfel, in April 2006 he informed a member of the three-member Albion Township Board, Mark Bobbe, that the entire one mile-long section line was "getting bad." Bobbe denied the conversation took place. Klipfel also said he told board member Virgil Dewald in June 2005 "that he needs to go down and take a look at this washout where Brason had his accident, and he said that he didn't have time that day, and that he would get at it." Dewald acknowledged the conversation took place and said he told Alfred Kappenman that "I would put it on the FEMA site and that we would inspect it," but admitted that "I didn't get to it." Dewald said that the township maintains its gravel roads, but does not maintain section line roads.

P5 In June 2007, Alfred Kappenman and Julie Ness brought this wrongful death action against Klipfel and Albion Township. They alleged Klipfel negligently maintained the portion of the section line where the accident occurred; Klipfel and Albion Township had a duty to abate or make the section line safe and knew or should have known of the existence of the trench and warned against the hazard; and the trench constituted a public nuisance entitling them to maintain a civil action against Klipfel and Albion Township under N.D.C.C. § 42-01-07(4). Klipfel and Albion Township moved for summary judgment and the district court granted the motions. The court concluded that Albion Township did not have a duty to repair the section line and the claims against it were barred by the discretionary immunity doctrine. The court also concluded the claims against Klipfel and Albion Township were barred by the recreational use immunity statutes and the washout in the section line did not constitute a public nuisance.

II

P6 Kappenman and Ness contend the district court erred in granting summary judgment dismissing their wrongful death action.

P7 The principles governing summary judgment are well-established:

Summary judgment under *N.D.R. Civ.P. 56(c)* is a procedural device for the prompt and expeditious disposition {765 N.W.2d 720} of any action without a trial "if either litigant is entitled to judgment as a matter of law and if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving factual disputes will not alter the result." *Duemeland v. Norback*, 2003 ND 1, P 8, 655 N.W.2d 76 (citing *Wahl v. Country Mut. Ins.*

Co., 2002 ND 42, P 6, 640 N.W.2d 689). Whether the district court properly granted a summary judgment motion "is a question of law that we review de novo on the record." *Trinity Hosps. v. Mattson*, 2006 ND 231, P 10, 723 N.W.2d 684. "The party moving for summary judgment must show . . . no genuine issues of material fact [exist] and the case is appropriate for judgment as a matter of law." *Id.* "In determining whether summary judgment was appropriately granted, we . . . view the evidence in the light most favorable to the party opposing the motion," giving that party "the benefit of all favorable inferences which can reasonably be drawn from the record." *Hasper v. Center Mut. Ins. Co.*, 2006 ND 220, P 5, 723 N.W.2d 409. However, "[u]nder N.D.R.Civ.P. 56, if the movant meets its initial burden of showing the absence of a genuine issue of material fact, the party opposing the motion may not rest on mere allegations or denials in the pleadings, but must present competent admissible evidence by affidavit or other comparable means to show the existence of a genuine issue of material fact." *Riemers v. Grand Forks Herald*, 2004 ND 192, P 4, 688 N.W.2d 167. *Alerus Fin., N.A. v. Western State Bank*, 2008 ND 104, PP 16-17, 750 N.W.2d 412.

A

P8 Kappenman and Ness argue the district court erred in ruling Albion Township had no duty to repair the section line. They contend that if Albion Township did not have a duty to repair, it at least had a duty to warn travelers of a known hazardous condition on the section line.

P9 If no duty exists on the part of an alleged tortfeasor, there is no actionable negligence. *Ficek v. Morken*, 2004 ND 158, P 9, 685 N.W.2d 98. Whether a duty exists is generally a question of law, but if the existence of a duty depends upon the resolution of factual issues, the facts must be resolved by the trier of fact. *Id.*

P10 "[C]ongressional section lines are considered public roads open for public travel." N.D.C.C. § 24-07-03. Section 24-06-01, N.D.C.C., provides that the "board of township supervisors of any township in the state has general supervision over the roads, highways, and bridges throughout the township." In *DeLair v. LaMoure County*, 326 N.W.2d 55, 61 (N.D. 1982), this Court construed N.D.C.C. § 24-07-03 and its predecessor statutes and held "a public road, as contemplated by NDCC § 24-07-03, does not impose a duty on a county or township to maintain an improved road on the section line. A county or a township does not have a duty to maintain an improved road on each section line, nor do we believe a county or a township can be held legally liable for injuries to persons using a portion of a designated public road which the county or township has not undertaken to improve." *DeLair* involved a motorcycle accident which occurred on a section line within the limits of an incorporated city. *Id.* at 56-57, 60. In limiting the parameters of its decision, the Court carefully noted:

In this instance we must keep in mind that there was a stop sign at the intersection of the county and township roads. There was no pit, structure, excavation or trap which was unusually {765 N.W.2d 721} hazardous in view of the fact that the intersection was controlled by a stop sign. Each individual driver must take some responsibility for obeying traffic signs, such as stop signs. We are not expressing an opinion as to the factual question of whether or not DeLair stopped at the stop sign; however, we believe that the intersection, controlled as it was by a stop sign, was not a dangerous or unusually hazardous condition to a driver exercising ordinary care and driving within the limits of the law. *Id.* at 63. *DeLair* did not address allegations of a failure to warn of a known hazardous condition on a section line.

P11 Although the *DeLair* Court held that a township has no duty to maintain an improved road on each section line, the Court further recognized the principle that "there is a duty to erect barriers or railings along highways and roads to make the way safe from hazardous or dangerous conditions for travelers using ordinary care." 326 N.W.2d at 62. Cf. N.D.C.C. § 24-06-31 ("Each overseer of highways having personal knowledge, or on being notified in writing, of any obstruction in the highway

or public street in the overseer's district immediately shall remove or cause any such obstruction to be removed."); *State v. Silseth*, 399 N.W.2d 868, 869 (N.D. 1987) ("Section lines are often referred to as highways."). Because a township has no duty under the law to maintain an improved road on each section line, we agree that "[a] township does not have a roving duty to inspect every unimproved and un-vacated section line for possible natural and man-made obstructions." *Douville v. Christensen*, 2002 SD 33, 641 N.W.2d 651, 655 (S.D. 2002). However, because a township is charged with the general supervision over roads throughout the township, we believe a township board cannot simply ignore hazardous or dangerous section line road conditions of which it has knowledge. We therefore conclude that a township board with actual knowledge of an unusually dangerous or unusually hazardous condition on an unimproved section line road has a duty to warn travelers of that condition. An "unusually dangerous" or "unusually hazardous" condition on a section line road is one so peculiarly dangerous there is a substantial risk that a person exercising ordinary care and driving within the limits of the law could not drive on that part of the road safely. See, e.g., *DeLair*, 326 N.W.2d at 63 ("[T]he intersection, controlled as it was by a stop sign, was not a dangerous or unusually hazardous condition to a driver exercising ordinary care and driving within the limits of the law"); *DiFrischia v. New York Cent. R.R. Co.*, 307 F.2d 473, 476 (3rd Cir. 1962) ("A crossing is unusually hazardous if there is substantial risk that a driver in the exercise of ordinary care may be unable to avoid collision with a train operated over the crossing in compliance with statutory requirements"); *Cunningham v. Baltimore and Ohio R.R. Co.*, 25 Md. App. 253, 334 A.2d 120, 124 (Md. Ct. Spec. App. 1975) (crossing is unusually dangerous "if the conditions surrounding it were so peculiarly dangerous that a person of ordinary prudence could not use the same with safety unless the defendant employed extraordinary means to give warning of the presence of its train standing across the highway" (internal citation omitted)); *Allinson v. Missouri-Kansas-Texas R.R. Co.*, 347 S.W.2d 902, 906 (Mo. Ct. App. 1961) (crossing is unusually hazardous "[i]f the motorist is exercising the requisite care for his own safety but the particular circumstances nevertheless create an illusion of safety" (internal citation omitted)); see also *Missouri, K. & T. Ry. Co. v. Long*, 299 S.W. 854, 855 (Tex Comm'n. App. 1927) ("more than ordinarily dangerous" crossing is "one that is so peculiarly dangerous {765 N.W.2d 722} that a person of ordinary prudence could not use the same with safety"). Constructive knowledge is insufficient to give rise to the duty. We further believe actual knowledge given to at least one member of the township board is sufficient to impose the duty. See *Pawelk v. Camden Township*, 415 N.W.2d 47, 51 (Minn. Ct. App. 1987) (knowledge of one township board member that employee had been in military obligated township board to provide employee notice and opportunity for hearing under Veterans Preference Act). Indeed, board member Dewald told Klipfel the board would inspect the washout based on the information Klipfel had given him.

P12 Here, Kappenman and Ness have alleged that Klipfel told two of the board members on different occasions that the section line was in a hazardous or dangerous condition. Although one of the board members denied that the conversation occurred, this allegation is sufficient to raise a genuine issue of material fact whether Albion Township had actual knowledge of an unusually dangerous or unusually hazardous condition on the section line. We conclude the district court erred in ruling Albion Township had no duty under these allegations and in granting summary judgment dismissal on this issue.

B

P13 Kappenman and Ness argue the district court erred in dismissing on summary judgment their action against Albion Township on the ground of discretionary immunity.

P14 In *Kautzman v. McDonald*, 2001 ND 20, P 30, 621 N.W.2d 871, this Court explained discretionary function immunity:

A political subdivision is exempt under N.D.C.C. § 32-12.1-03(3) from liability for an act or omission of its employees who are performing discretionary functions or duties. We engage in a two-part inquiry when determining whether the discretionary function exception applies: (1)

whether the conduct at issue is discretionary, involving an element of judgment or choice for the acting employee; and (2) if the act is discretionary, whether that judgment or choice is of the kind the discretionary function exception was designed to shield. *Olson v. City of Garrison*, 539 N.W.2d 663, 666-67 (N.D. 1995). P15 We further explained in *Peterson v. Traill County*, 1999 ND 197, P 13, 601 N.W.2d 268:

The primary focus of the second part of the test is on the nature of the actions taken and on whether they are susceptible to policy analysis. *Olson*, 539 N.W.2d at 667. We explained in *Olson*, 539 N.W.2d at 667-68 (citations omitted): The purpose of the discretionary function exception is to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." When properly construed, the exception should shield only governmental action based on public policy considerations. Moreover, public policy considerations, social, economic, or political, must be distinguished from more objective standards based on, for example, scientific, engineering, or technical considerations. The latter are not protected by the discretionary function exception, when the challenged conduct involves nothing more than a "follow the numbers" approach. P16 Under N.D.C.C. § 24-06-01, the township has general supervision over the roads throughout the township. We have held that a township board with actual knowledge of an unusually dangerous or {765 N.W.2d 723} unusually hazardous condition on a section line road has a duty to warn travelers of that condition. Kappenman and Ness have alleged that Albion Township had knowledge of the dangerous washout on the section line because Klipfel had informed two members of the Board on different occasions. Several courts have held that discretionary function immunity does not shield governmental entities from failing to repair or warn against known hazards on roadways under their control because the failure to repair or warn against the dangerous condition does not involve the exercise of social, economic, or political policy. See, e.g., *Cope v. Scott*, 45 F.3d 445, 451-52, 310 U.S. App. D.C. 144 (D.C. Cir. 1995) (failure to post adequate warning signs about dangerous nature of road surface); *Seyler v. United States*, 832 F.2d 120, 122-23 (9th Cir. 1987) (failure to erect speed limit signs on road); *ARA Leisure Servs. v. United States*, 831 F.2d 193, 195-96 (9th Cir. 1987) (failure to maintain road in a safe condition); *McClure v. Nampa Highway Dist.*, 102 Idaho 197, 628 P.2d 228, 229 (Idaho 1981) (failure to post warning signs indicating an impending curve in road); *Ladner v. Stone County*, 938 So.2d 270, 275 (Miss. Ct. App. 2006) (failure to properly maintain and repair bridge and warn of its dangerous condition).

P17 We agree with the reasoning of these courts. Failing to warn of an unusually dangerous or unusually hazardous condition in a road implicates no social, economic, or political policies. Although Albion Township stresses its "small budget," it acknowledges that "[i]t may not have cost much for the township to dump some gravel or place some flags on the section line at issue." We further note undue emphasis on economic considerations would permit discretionary function immunity to cover all government decision-making because "[b]udgetary constraints underlie virtually all governmental activity." *ARA Leisure Servs.*, 831 F.2d at 196; see also *Cope* 45 F.3d at 449 ("The mere presence of choice—even if that choice involves whether money should be spent—does not trigger the exception.").

P18 We conclude that discretionary function immunity does not shield Albion Township from liability if it had actual knowledge of an unusually dangerous or unusually hazardous condition of the section line.

C

P19 Kappenman and Ness argue the district court erred in ruling Klipfel and Albion Township were shielded from suit by the recreational use immunity statutes, N.D.C.C. ch. 53-08. The court reasoned:

Brason was riding the ATV home from the field where he was working. On the trip home Brason was looking for a place to put his deer stand for the upcoming hunting season. Alfred and Brason

Kappenman had planned on putting up deer stands the following weekend. Had Brason not detoured to look for a spot to place his stand he would have taken a different, more direct route home from the field. His use of the section line was indeed recreational in nature. P20 In *Leet v. City of Minot*, 2006 ND 191, P 20, 721 N.W.2d 398, a majority of this Court noted that "[t]he proper analysis in deciding whether to apply the recreational use immunity statutes must include consideration of the location and nature of the injured person's conduct when the injury occurs." Although the district court focused on the nature of the injured person's conduct when the injury occurred, the court did not fully analyze the location of the accident.

{765 N.W.2d 724} P21 The accident occurred on a section line. Section 24-07-03, N.D.C.C., provides that "[i]n all townships in this state, outside the limits of incorporated cities, and outside platted townsites, additions, or subdivisions . . . , the congressional section lines are considered public roads open for public travel to the width of thirty-three feet [10.06 meters] on each side of the section lines." See also *Small v. Burleigh County*, 225 N.W.2d 295, 300 (N.D. 1974) ("We hold that congressional section lines outside the limits of incorporated cities, unless closed by proceedings permitted by statute, are open for public travel without the necessity of any prior action by a board of township supervisors or county commissioners."). Here, the analysis must begin with an interpretation of the recreational use immunity statutes and their applicability to public roads open to public travel. In *State v. Wetzel*, 2008 ND 186, P 4, 756 N.W.2d 775, we said:

The interpretation of a statute is a question of law. *Baukol Builders, Inc. v. County of Grand Forks*, 2008 ND 116, P 22, 751 N.W.2d 191. This Court's primary objective in interpreting a statute is to ascertain legislative intent. *Id.* Words of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, "the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. If the language of a statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute. N.D.C.C. § 1-02-39. Statutes must be construed to avoid absurd and ludicrous results. *County of Stutsman v. State Historical Soc'y*, 371 N.W.2d 321, 325 (N.D. 1985). P22 North Dakota's recreational use immunity statutes were enacted to encourage landowners to open their land for recreational purposes by giving them immunity from suit under certain circumstances. See *Leet*, 2006 ND 191, P 14, 721 N.W.2d 398; *Olson v. Bismarck Parks & Recreation Dist.*, 2002 ND 61, P 6, 642 N.W.2d 864. Under N.D.C.C. § 53-08-02, "an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes." Section 53-08-03, N.D.C.C., further provides:

Subject to the provisions of section 53-08-05, an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby: 1. Extend any assurance that the premises are safe for any purpose; 2. Confer upon such persons the legal status of an invitee or licensee to whom a duty of care is owed; or 3. Assume responsibility for or incur liability for any injury to person or property caused by an act or omission of such persons. "Land" is defined as including "all public and private land, roads, water, watercourses, and ways and buildings . . ." N.D.C.C. § 53-08-01(2) (emphasis added). "Owner" is defined as including "tenant, lessee, occupant, or person in control of the premises." N.D.C.C. § 53-08-01(3). "Recreational purposes" is defined as including "any activity engaged in for the purpose of exercise, relaxation, pleasure, or education." N.D.C.C. § 53-08-01(4). Section 53-08-05(1), N.D.C.C., provides **{765 N.W.2d 725}** that the chapter "does not limit in any way any liability that otherwise exists for . . . [w]illful and malicious failure to guard or warn against a dangerous condition, use, structure, or activity."

P23 Although N.D.C.C. § 53-08-01(2) includes public "roads" in the definition of "land," we do not

believe the legislature intended to relieve government entities of their duties as supervisors of roads under all circumstances because public roads are primarily opened for purposes of travel, not recreation. Courts in other jurisdictions have refused to apply recreational use immunity statutes to public roads.

P24 In *Jerz v. Salt Lake County*, 822 P.2d 770, 771 (Utah 1991), the plaintiff was driving and sightseeing on a narrow public road listed on the county road system which led to recreation areas for hunting and camping when his vehicle struck a large rock protruding from the surface of the road causing the vehicle to veer off the road and into a canyon. The trial court granted summary judgment dismissing the complaint because Utah's recreational use immunity act, which included "roads" in the definition of "land," covered the road and the plaintiff was engaged in a recreational activity at the time of the accident. *Id.* at 771. The Utah Supreme Court disagreed that the road was covered under the Act:

If the purpose of the Act is to be subserved, it would seem that in order for a road to come within the protection of the Act, it should be capable of being closed to public use at any time. This conclusion follows from the Act's purpose, to encourage owners of land to open land (roads) for public recreation use. The County does not contend that it could permanently close the road in Butterfield Canyon to public use without following the statutory procedure for abandoning public roads generally. See Utah Code Ann. § 17-5-38(1). It therefore appears that since it is on the county road system and is maintained by the County, the Butterfield Canyon road is not characteristic of the type of road which was intended to be protected under the Act. . . . We need not and do not now determine what type of roads are protected by the immunity granted by the Act to public entities against suits by users of their roads. We only decide that the immunity was not intended by the legislature to extend to roads of the type in Butterfield Canyon. That road is on the county road system, is maintained by the County, and can be used for recreational or nonrecreational purposes, and Jerz was traveling in an on-highway vehicle. Nothing distinguishes this road from hundreds of miles of other public roads in this state except that it is not as improved and it receives only a low level of maintenance. *Id.* at 771-72, 774.

P25 In *Seyler v. United States*, 832 F.2d 120, 121 (9th Cir. 1987), the trial court granted summary judgment dismissing based on Idaho's recreational use statute an action brought by the plaintiff, who was injured while riding for pleasure on a friend's motorcycle on a road maintained by the Bureau of Indian Affairs. The Ninth Circuit Court of Appeals ruled Idaho's recreational use statute, which also defined "land" as including "roads," did not bar the plaintiff's action:

We think it is clear that the district court misconstrued and misapplied Idaho's recreational use statute. Seyler's accident occurred on Agency road 11, a two-lane, paved public highway maintained by the Bureau of Indian Affairs. The government's contention, accepted **{765 N.W.2d 726}** by the district court, is that the recreational use statute applies on *any* road or highway in Idaho. Such a result is clearly absurd. The Idaho legislature cannot have intended to remove tort protection against road defects from all persons who drive for other than business purposes anywhere in Idaho. To apply the recreational use statute to the ordinary street or highway ignores the purpose of the statute, which is to encourage landowners to open land to the public that would otherwise be closed to it. Moreover, application of the statute is particularly egregious in this case. Idaho's recreational use statute applies on its face only to landowners who "invite [] or permit [] without charge any person to use [their] property for recreational purposes." Idaho Code § 36-1604(d). The landowner is freed from any duty to warn "persons entering for [recreational] purposes." *Id.* § 36-1604(c). We do not agree that the government "invited" or "permitted" Seyler to use a public highway on his own reservation. Nor is Seyler, while on his tribe's reservation, in a position at all comparable to that of a "person entering" land of another for recreational or any other purposes. *Id.* at 122.

P26 Similarly, in *Smith v. Southern Pacific Transp. Co., Inc.*, 467 So. 2d 70, 73 (La. Ct. App. 1985),

the court refused to apply the recreational use statute to a street in a city park where the plaintiff was injured while driving:

In the instant case, although City Park is set aside for recreational purposes, the street used by plaintiff is open to the motoring public for purposes other than recreational use. The intent of the above cited statute was to encourage landowners to allow the public to use their property for recreational purposes. See, *Section 1 of Act, No. 615 of 1975*. The statutes specifically refer to use of the land for recreational purposes. However, where persons are allowed to use the property for purposes not associated with recreational activities, the statutes should not apply. P27 In *Miller v. City of Dayton*, 42 Ohio St. 3d 113, 537 N.E.2d 1294, 1296-97 (Ohio 1989), the Ohio Supreme Court, interpreting its recreational use statute, held "[t]he existence of statutory immunity does not depend upon the specific activity pursued by the plaintiff at the time of the plaintiff's injury. Rather, the inquiry should focus on the nature and scope of activity for which the premises are held open to the public." Applying this test, the court in *Vinar v. City of Bexley*, 142 Ohio App. 3d 341, 755 N.E.2d 922, 925 (Ohio Ct. App. 2001), concluded a roadway through a city park that was available to motorists and bicyclists for travel not related to recreational use was not covered by the statute:

Ohio's recreational user statute is similar to statutes in other jurisdictions in that "the purpose of the statute is "to encourage owners of premises suitable for recreational pursuits to open their land to public use without worry about liability."" *Marrek v. Cleveland Metroparks Bd. of Comms.*, (1984), 9 Ohio St. 3d 194, 198, 9 OBR 508, 511, 459 N.E.2d 873, 877, quoting *Moss v. Dept. of Natural Resources* (1980), 62 Ohio St.2d 138, 142, 16 O.O.3d 161, 163-164, 404 N.E.2d 742, 745. As previously noted, the property at issue is a roadway, available to the general public for travel by vehicles and bicycles, which happens to be a thoroughfare through a park. Because the roadway is available to the public for nonrecreational travel, we conclude that the statutory immunity provided by R.C. 1533.181 is not afforded {765 N.W.2d 727} to the city under the facts of this case. See also *Ross v. Strasser*, 116 Ohio App. 3d 662, 688 N.E.2d 1120, 1123 n.1 (Ohio Ct. App. 1996) ("property may be used for recreational purposes without being transformed into 'recreational premises'"); *Brinkman v. City of Toledo*, 81 Ohio App. 3d 429, 611 N.E.2d 380, 383-84 (Ohio Ct. App. 1992) ("It is not uncommon to find children playing ball in city streets, or to see families strolling the sidewalks of city neighborhoods. However, the essential character of streets is not recreational. Nor are sidewalks held out as essentially recreational despite being commonly used for recreational purposes.").

P28 Although these cases did not involve an unimproved section line road, we agree with the reasoning of these courts under the circumstances here. Section 24-07-03, N.D.C.C., declares the section line where the accident occurred in this case to be a public road open for public travel. The record does not reflect that the section line has been closed or vacated under the procedures set forth in N.D.C.C. ch. 24-07. The section line is held out for purposes of travel rather than recreation, and is used for both recreational and nonrecreational purposes as reflected by the evidence that farmers use the section line to access their farmland. Because the section line is made available to the public for nonrecreational travel, we conclude the recreational use immunity statutes do not apply in this case.

P29 This conclusion is consistent with our caselaw applying the recreational use immunity statutes. In each case, the injury occurred in a place that was opened for a recreational purpose. See *Olson*, 2002 ND 61, P 2, 642 N.W.2d 864 (sledding on a hill at a golf course); *Fastow v. Burleigh County Water Res. Dist.*, 415 N.W.2d 505, 507 (N.D. 1987) (swimming at a dam); *Stokka v. Cass County Elec. Coop., Inc.*, 373 N.W.2d 911, 915 (N.D. 1985) (snowmobiling in a ditch); but see *Umpleby v. United States*, 806 F.2d 812, 813 (8th Cir. 1986) (under North Dakota law, recreational use immunity statutes applied to accident on road owned by United States Army Corps of Engineers). Our interpretation of the recreational use immunity statutes also helps alleviate the constitutional concerns expressed in *Hovland v. City of Grand Forks*, 1997 ND 95, 563 N.W.2d 384, 388 (N.D. 1997). To the

extent our decision conflicts with the decisions of the Eighth Circuit Court of Appeals interpreting North Dakota's recreational use immunity statutes in *Umpleby* and *Cudworth v. Midcontinent Comm.*, 380 F.3d 375 (8th Cir. 2004), we find those decisions unpersuasive.

P30 We conclude the district court erred in granting summary judgment dismissing this action on the ground it was barred by the recreational use immunity statutes.

III

P31 Kappenman and Ness argue the district court erred in dismissing Klipfel from the action because they claim he had a duty to warn travelers of known hazards existing on the section line.

P32 In *Small*, 225 N.W.2d at 297, this Court said that "[i]n North Dakota the rights of the public to section line highways and to streets are easements only, limited to the right to travel and other rights incident thereto, and the owner of the adjoining land owns the fee title to the property included in the 33 foot easement up to the section line." See also *Burleigh County Water Res. Dist. v. Burleigh County*, 510 N.W.2d 624, 628 (N.D. 1994) ("A landowner abutting an open section line retains ownership of the property within the easement, subject to the public's {765 N.W.2d 728} right to travel."). Although the landowner abutting a section line continues to own the land subject to the easement, it is long-settled law that the landowner, in the absence of a statute to the contrary, does not owe to the public a duty to keep the highway or street in a safe condition. 40 Am. Jur. 2d *Highways, Streets, and Bridges* § 402 (2008). The Restatement (Second) of Torts § 349 (1965), provides:

§ 349. Dangerous Conditions in Public Highway or Private Right of Way A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care (a) to maintain the highway or way in safe condition for their use, or (b) to warn them of dangerous conditions in the way which, although not created by him, are known to him and which they neither know nor are likely to discover. The "possessor of land over which there is a public highway is subject to liability for physical harm caused to travelers thereon by a failure to exercise reasonable care in creating or maintaining in reasonably safe condition any structure or other artificial condition created or maintained in the highway by him or for his sole benefit subsequent to its dedication." Restatement (Second) of Torts § 350 (1965).

P33 North Dakota has adopted these principles in N.D.C.C. § 47-01-23, which provides:

A landowner may not be held liable for a claim resulting from the use or condition of a road across the landowner's property unless the landowner is primarily and directly responsible for the construction and maintenance of the road or an affirmative act of the landowner causes or contributes to the claim. P34 In this case, Kappenman and Ness have presented no competent evidence to suggest that Klipfel caused or contributed to the condition of the washout before the accident occurred. We conclude the district court did not err in ruling Klipfel owed no duty as the landowner under these circumstances.

IV

P35 Kappenman and Ness argue the district court erred in dismissing their action based on public nuisance. The district court dismissed the nuisance action because it concluded "[n]either the township nor Klipfel did anything that was illegal or omit a duty."

P36 Nuisance is defined in N.D.C.C. § 42-01-01:

A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission: 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others; . . . 3. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or 4. In any

way renders other persons insecure in life or in the use of property. A "public nuisance is one which at the same time affects an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." N.D.C.C. § 42-01-06. A civil action is a remedy against a public nuisance, see N.D.C.C. § 42-01-07(4), {765 N.W.2d 729} and a "private person may maintain an action for a public nuisance if it is specially injurious to that person or that person's property, but not otherwise." N.D.C.C. § 42-01-08. Whether a nuisance exists is a mixed question of fact and law. *City of Fargo v. Salsman*, 2009 ND 15, P 9, 760 N.W.2d 123.

P37 Nuisance requires proof of an unlawful act or the failure to perform a duty. N.D.C.C. § 42-01-01. We have held that Klipfel owed no duty as a landowner under these circumstances, and Kappenman and Ness have not alleged that Klipfel engaged in an unlawful act. We therefore conclude that the district court did not err in dismissing the nuisance claim against Klipfel.

P38 We did rule that a township with actual knowledge of an unusually dangerous condition or unusually hazardous condition on an unimproved section line road has a duty to warn travelers of that condition, and that Kappenman and Ness have raised a genuine issue of material fact whether Albion Township had actual notice. Breach of a duty sounding in tort will give rise to an action based upon nuisance, and proof of a violation of a statutory duty is not necessary. See *Rassier v. Houim*, 488 N.W.2d 635, 637-38 (N.D. 1992); *Knoff v. American Crystal Sugar Co.*, 380 N.W.2d 313, 317-18 (N.D. 1986).

P39 Because we have held a township has a duty to warn if it has actual knowledge of an unusually dangerous or unusually hazardous condition on an unimproved section line road, we conclude the district court erred in dismissing the nuisance action against Albion Township.

V

P40 Because of our disposition of this case, it is unnecessary to address the other issues raised. We conclude the district court erred in granting summary judgment dismissing Albion Township from the action, but did not err in dismissing Klipfel from the action. We affirm in part, reverse in part, and remand for further proceedings.

P41 Mary Muehlen Maring

Dale V. Sandstrom

James M. Bekken, D.J.

I concur in the result.

Daniel J. Crothers

P42 The Honorable James M. Bekken, D.J., sitting in place of Kapsner, J., disqualified.

Concur

Concur by: Gerald W. VandeWalle
VandeWalle, Chief Justice, concurring.

P43 I concur in the result reached by Justice Maring, writing for the majority. Regarding the issue of recreational use immunity, there is concededly some tension between the result we reach in this case and our decision in *Leet v. City of Minot*, 2006 ND 191, 721 N.W.2d 398, and between the decision in this case and my dissent, joined by Justice Sandstrom, in *Hovland v. City of Grand Forks*, 1997 ND 95, P 21, 563 N.W.2d 384.

P44 In *Hovland*, the issue was whether the recreational use statute shielded the City from a claim for damages resulting from the use of a bike path constructed and maintained by the City. The

majority opinion in that case held the City was not immune from damages under the statute because, at the time of the injury, the statute did not apply to public lands and to apply it to all public lands used for recreational purposes might cause disparate treatment between those using the public land, the bike trail, for recreational purposes and those using it for non-recreational activities. *Id.* at P 13. After the accident, but prior to our opinion in *Hovland*, the Legislature amended the statute {765 N.W.2d 730} to clearly indicate that public lands were included in the definition of "land" for purposes of the recreational use statutes in Chapter 53-08, N.D.C.C. See 1997 N.D. Sess. Laws ch. 162, § 7, amending subsection 2 of N.D.C.C. § 53-08-01. That same section also amended subsection 4 of § 53-08-01 to define "Recreational purposes" to include "any activity engaged in for the purpose of exercise, relaxation, pleasure, or education." Those definitions govern our decision in this case although they did not guide the majority's decision in *Hovland*, because they were not in effect at the time of the injury.

P45 Although I remain convinced *Hovland* was wrongly decided for the reasons stated in my dissent in that case, I am persuaded that even though public lands are now governed by the recreational use statute, and a section line is an unimproved "public" road, there is, as the cases cited by the majority opinion in this case indicate, a substantial and unique difference between a road whose purpose is for travel and other facilities whose primary, if not sole purpose, is for recreational use. Establishment and maintenance of public roads for the purpose of allowing the citizens to travel are among the primary responsibilities of national, state and local government. I agree the Legislature did not intend to foreclose a claim for damages by one who is using the public road for recreation or who is traveling on the road to a recreational use. Neither the primary nor incidental purpose of the ordinary public road is for recreation; rather, it is for travel and a person is entitled to travel on the road regardless of the purpose of the journey. If we are wrong in our conclusion, the Legislature presumably will amend the statute to clearly indicate its intent with regard to public roads.

P46 In *Leef*, we decided the City of Minot was not shielded from liability for the injuries to a worker who was preparing the city auditorium for a Seniors event. We concluded the worker's presence at the auditorium was for employment purposes and not for a "recreational purpose." Under N.D.C.C. § 53-08-02 an owner of land used for recreational purposes is shielded from liability "to persons entering for such purposes" and in *Leef* the worker did not enter the auditorium for recreational purposes. Here the township argues that Kappenman was using the road for recreational purposes; but there is a difference between the ordinary public road and land or a facility either maintained for a recreational use or allowed to be used for recreational purposes. See *Olson v. Bismarck Parks & Recreation Dist.*, 2002 ND 61, P 6, 642 N.W.2d 864 (recognizing recreational use immunity statutes advance the important legislative goal of opening property to the public for recreational use). The ordinary road is not established for recreational use or opened for recreational use. It is a public thoroughfare upon which people travel and the purpose of their travel is immaterial. Our conclusion does not compromise the legislative goal recognized in *Olson*.

P47 Finally, a road established on a section line as a matter of law under N.D.C.C. § 24-07-03 is not required to be maintained. *DeLair v. LaMoure County*, 326 N.W.2d 55 (N.D. 1982). I believe that in determining whether or not a road is in an unusually dangerous or hazardous condition it is significant that such a road which has not been maintained may, in its natural state, already be in a dangerous condition and yet imposes no duty on the township or the county.

P48 Gerald W. VandeWalle, C.J.
James M. Bekken, D.J.

CHAPTER 12.1-02 LIABILITY AND CULPABILITY

12.1-02-01. Basis of liability for offenses.

1. A person commits an offense only if the person engages in conduct, including an act, an omission, or possession, in violation of a statute which provides that the conduct is an offense.
2. A person who omits to perform an act does not commit an offense unless the person has a legal duty to perform the act, nor shall such an omission be an offense if the act is performed on the person's behalf by a person legally authorized to perform it.

12.1-02-02. Requirements of culpability.

1. For the purposes of this title, a person engages in conduct:
 - a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.
 - b. "Knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.
 - c. "Recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct, except that, as provided in section 12.1-04-02, awareness of the risk is not required where its absence is due to self-induced intoxication.
 - d. "Negligently" if he engages in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.
 - e. "Willfully" if he engages in the conduct intentionally, knowingly, or recklessly.
2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.
3.
 - a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is "intentionally", the culpability required as to an attendant circumstance is "knowingly".
 - b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to the result.
 - c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.
 - d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in chapters 12.1-01 through 12.1-06; otherwise the least kind of culpability required for the offense is required with respect to such facts.