

2011 SENATE POLITICAL SUBDIVISIONS

SB 2161

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
January 20, 2011
13146

Conference Committee

Committee Clerk Signature	
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Explanation or reason for introduction of bill/resolution

Relating to political subdivision liability

Minutes:

Attached testimony

Senator Andrist opened the hearing on SB 2161 relating to political subdivision liability.

Senator Gary Lee, District 22 introduced this bill. He also supports this bill. See written testimony.

Aaron Birst, representing the Association of Counties, in support for SB216. See written testimony.

Senator Andrist: Is there a definition in statute for what constitutes improved or unimproved roads? Does there need to be, do you think? **Aaron Birst:** Currently there is no definition and we struggled with trying to come up with the language associated with that. If the committee had some idea how to clarify, and again the intent of this is to clarify for the Supreme Court, the distinction between an improved road and one that is just there. If the committee has ideas we certainly will be willing to take a look at some of those ideas.

Senator Andrist: Based on my frame of reference in a rural western community, my logic tells me that you wouldn't need a definition, because if nobody has ever done anything to create a road, it's just a trail.

Senator Olafson: May I have more information on the state already enjoying the protection against liability claims. How is this specifically worded and is that specific to unimproved section lines or is it a broad general protection for all lands owned by the state? **Aaron Birst:** Essentially the language just says unimproved property, towards that property owned by the state or leased by the state, if it's unimproved there is no claim. **Senator Olafson:** So that particular section does not specifically refer to any section lines? **Aaron Birst:** No, it does not.

Steve Spilde, Chief Executive Officer of the North Dakota Insurance Reserve Fund (NDRF), supports SB 2161. See written testimony.

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Ken Yantes, Executive Secretary of the North Dakota Township Officers Association. I support SB 2161. See written testimony.

Alan Austad, Executive Director of the North Dakota Association for Justice. Our members are basically trial lawyers who work throughout the state. We also have as members, county prosecutors, defense attorneys; it covers the gambit of the legal systems in North Dakota. Our association for basic reasons is opposed to bills that grant people immunity. When you do that you take away their responsibility to do what they are asked to do. This case in reference, they are asking to be held not responsible for something they didn't do. When you're held responsible for what you do as a person, that should also apply to government and the business. **Senator Andrist**: It would be my understanding, if passage or failure of this bill would really have no impact on an existing case would it?

Alan Austad: No, not on any existing case, but it would have impact on future issues. If you know a road is bad, fix it. This is not a situation where nobody knew, they knew. This is an attempt to say well we don't have to do that. That is not right. **Senator Judy Lee**: We've heard from earlier testimony, who have spoken to us that the state has limited liability in this situation. Can you explain to me why the same shouldn't be true for townships? **Alan Austad**: Why, I think there are two differences. One you travel on in the state as I understand it and I am not an attorney. Whereas they are talking unimproved land maybe twenty acres sitting out there, that is an entirely different thing than what people used to drive on. **Senator Olafson**: You just made a statement, "If you know a road is bad, fix it." Is that a verbatim quote? **Alan Austad**: Pretty close, yes I am talking townships road. I grew up in a rural area and we drove on township roads. **Senator Olafson**: The bill does not refer to roads; it refers to unimproved section lines which are not maintained as roads. There is a clear difference there and I just wanted to point that out. **Alan Austad**: I guess where I grew up, township was a road. Because that is how we got places. There weren't improved township roads, but my definition of this is not a legal definition. We drove the path to get from one place to another. It was the section line. **Senator Olafson**: But the bill does not specify maintained roads, it specifies totally unimproved section lines. There is the difference. **Alan Austad**: Not to argue a point, but I think that where we grew up, they were unimproved section lines, but we used them as roads. They probably are defined as a road, but that is what we used them as. **Senator Olafson**: I understand that, but there are a lot of section lines that are never used as a road. It is a hayfield, in some cases its' tillable, its land that is tilled. There is a clear difference between that and what a township or a county is maintaining as a road for the travelling public. **Senator Andrist**: Both of these viewpoints will be considered when we deliberate the bill.

David Bliss, McKenzie, North Dakota, Attorney Advisor to townships and other political subdivisions. I oppose SB 2161 and urge a do not pass. Mr. Bliss explained in great detail the court case of Kappenman vs. Klipfel. See attached testimony.

Senator Andrist: We have section lines out in the west, hardly prairie trails. You wouldn't even know if they were section lines. Should the township have responsibility for somebody who figures out where that township line is? **David Bliss**: Yes, because as was testified earlier, these are congressional mandated section lines. You can't change those. The townships are responsible for things that happen on section lines. We also as landowners

have a responsibility too. You can't prevent access to a section line road. If you have a shelter belt, well, you haven't closed off that section line. And if you do close the section line, you can through the process provided to the counties. If you have to close it off, if you can't that is in our constitution. **Senator Olafson:** Hypothetical example given. Does the township have responsibility for those types of obstructions and dangers? Where do we assign liability for something like that? Where do we draw the line as a legal matter on some of these obstructions, like a rock, tall grass? **David Bliss:** Lets' take the rock in the middle of a non-improved section line road. **Senator Olafson:** Non-improved section line road you said? **David Bliss:** Right of way, let's say it's a congressional right of way. There may or not be a trail on it. There is an obstruction there. Again, these congressional section lines are mandated at statehood. This is not an issue. It's not an issue that the townships have authority over these. Example cited with response to example. **Senator Olafson:** What you're saying is the law should provide that if no one knew about it there is no liability? **David Bliss:** That's correct. **Senator Olafson:** If they did know about it, there is liability, that's your position. **David Bliss:** That's not my position, that's my view of the law. That's what the law says. So that a township again, is not liable for any example cited in hearing, you can't sue the township. Now with this law, you can't sue the township if they do have notice. It is very fundamental. A last piece of this puzzle, well political subdivisions have to take responsibility too. Now they don't take responsibility for things they don't know about, why should you sue a township if I don't know anything about it? You can't do that, that's right, and that's what the law is. Now, if you have notice as this township did, take responsibility for what you have and being clear what these kinds of laws would do.

Senator Judy Lee: I would like to know your position about the fact then that you're asking for a different standard of liability for the townships than is currently in place in the state, as its' been earlier expressed on unimproved property. **David Bliss:** Well I don't know that. **Senator Judy Lee:** We were told that the state does not have liability in situations where if something has happened on unimproved property, if I recall correctly from an earlier testifier. This will be asking for something that would give the townships more responsibility than the state has in a comparable situation or explain why that's not true, because that is my impression. **David Bliss:** I was a little confused with that testimony. In my view, what the state law is now, that is you have a known hazard on an unimproved section line and somebody gets hurt, the township can be sued. If you don't have any notice on a non-improved section line of a hazard and somebody gets hurt, you can't sue the township, you can, but they will win. That's the law as it stands now. The political subdivisions don't get a free pass, on unimproved section roads. **Senator Judy Lee:** Unimproved section lines. **David Bliss:** Unimproved section lines. **Senator Judy Lee:** Skip the roads. **David Bliss:** Unimproved section lines. That shouldn't be any surprise, because historically, our congressional section lines, again congressionally mandated, they are there permanently. The township has responsibility for that. Townships have an insurance company represented here today. Townships pay premiums for insurance. There has to be that liability again if you're a political subdivision. **Senator Lee:** My question wasn't answered. There is apparently a difference between what the state's current liability is, the state, and what the townships liability currently is? **David Bliss:** I would have to look at what they are referring too in terms of state law versus what the responsibility of townships is. I am not prepared to answer that legal division at this point. What I can say is that townships as political subdivisions do have that responsibility under Kappenman. The umbrella over

everything here is the issue of sovereign immunity, and that doesn't change regardless of that definition. Now there is no sovereign immunity in North Dakota as of 1996.

Senator Judy Lee: Whether it is any private citizen, what is my personal responsibility for making sure that wherever it is that I am travelling, that I am not overdriving whatever the circumstances might be in that area, with which I might not be totally familiar? The same sense, as someone who dives into a pond, has some responsibility for knowing that the pond is deep enough for diving, and it isn't necessarily the fault of the township on which the pond may be on the section line or the individual who owns the farm or ranchland where there is a pond. They are not responsible for posting that you shouldn't dive into the pond because its' only 3 feet deep which obviously varies with wetland issues. There are very different. But we're back again to what the personal responsibility might be of a person and making sure I am going somewhere where I know what is ahead of me and that I am not overdriving the circumstances. **David Bliss:** That is a good question. Example cited. The lawsuit presented to the townships, whereas the township is going to respond and defend that by saying you know that person was acting irresponsibly, so you bring your lawsuit. It goes through the courts and the first thing the subdivision is going to do is to bring a motion for summary judgment saying this is ridiculous. As a matter of law the person was acting irresponsibly or they will find other mechanisms by which to dismiss that lawsuit before it goes to trial. If there are no genuine issues or material fact, that lawsuit isn't going to go anyplace. Key, when we talk about personal responsibility and corporate responsibility in the sense of what many of us do when we are on political subdivisions.

Senator Olafson: Directed to the Attorney for the Association of Counties, does this apply to all property or is specific to section lines? His response was that it applies to all unimproved property, so that is even a broader coverage of immunity from liability than what we are talking about here in terms of pure land area for no other description of it. So I would like to get a clarification about that too. Why does the state have this apparently broad general immunity from liability and yet the counties and townships currently do not, that's an incongruity in my mind. You're not prepared to speak to that specific section of the code, but I think this committee should get some type of clearer picture of why we have that incongruity? Please provide us with that information, I would appreciate that. **David Bliss:** I would be pleased to do that. This is an important issue, and it isn't good guy; bad guy here. We're just trying to do what the law requires us to do. Lastly we've been talking about congressional section lines; we've been talking about responsibility. What I understand this bill to do from the testimony is to say well it's okay, we'll be liable for the roads we improve, but we're not going to be liable for those unmaintained roads. We aren't going to go there or on unmaintained section lines. That is inconsistent as a matter of policy.

Senator Dotzenrod: Mr. Bliss, if many of these townships have 10 or less people living in the townships, how many rural townships are really getting thinly populated. It is hard to find people to be on the board, so you have a small number of people and if there in a busy time of the year and they are notified of the hazard they may be able to get out there right or they may not, they just don't have a lot of resources, so can they protect themselves by putting up a sign that says this is not an improved road or unimproved road, or road closed, or something similar that will recognize they know there is a hazard there, but they are trying to inform the public not to access that road because there is something ahead that

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could be dangerous. If they can do that, put the sign up, does that then relieve them of the liability? **David Bliss:** Yes. Example cited.

Senator Andrist: I have always been told that the signage does not provide any immunity from liability. Is that wrong? Signage does not absolve you of the responsibility for a hazard.

David Bliss: In many cases that is true. In this case the way I had read the law, when we were looking at it, I thought the defense would have an excellent position had they done anything at all. You don't have to do anything before the notice, it has to be done after the notice. If you didn't have notice, there is no liability for the township for that.

Senator Olafson: Could Mr. Bliss provide an analysis of this current section of law which provides this immunity for the state? I would like Mr. Birst from the Association of Counties to provide his analysis so we have the analysis of both? **Senator Andrist:** Would that be possible? Yes, from both in attendance.

Senator Judy Lee: I would like to add a third thing, ask our intern who will have a non-bias perspective to add to the discussion.

Julie Ness: See written testimony in opposition of SB 2161. **Senator Andrist:** We all add our condolences to you. We understand the tragedy that was involved here. Did you live in this same township, you and your son? **Julie Ness:** I did, I think this accident took place probably two weeks after my divorce and I had not been living there for six weeks prior to the accident. **Senator Andrist:** You say the township officers were aware of the hazard, were you unaware of the hazard? Was it generally unknown to the rest of the township peoples other than the township officers or did everybody know about it? **Julie Ness:** Many people did know about it, I myself did not know of it. I talked to a township board member that was close to 80 years old and he said that this was an issue way back when he was serving as board member. We interviewed many other people within the township who also said they had expressed concern about this area in this section line before. The land owner who owned property on both sides of the section line, himself offered to help with the expenses and machinery to the township to fix this area.

Alfred Kappenman: See written testimony in opposition of SB 2161. **Senator Andrist:** Were you aware of this hazard? **Alfred Kappenman:** It's always been there when deer hunting. But you could always drive through it with a vehicle. It's never been washed out like that or cut out. It was cleaned out and it was deep. **Senator Andrist:** It was just recently changed? **Alfred Kappenman:** Yes. The landowner changed it and told the township about it.

Senator Andrist: Closed hearing on SB 2161.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
January 21, 2011
13217

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to political subdivision liability

Minutes:

You may make reference to "attached testimony."

Senator Andrist asked the committee to discuss SB 2161. After much discussion the committee decided to ask for outside assistance before deciding on this bill.

Senator Andrist: I will talk with Tom Trenbeath and see if I could craft something that would give them the liability that maintains responsibility where section lines are unimproved, hazards are known to exist and they are notified in writing. I think they should put up a four inch signs.

Senator Olafson: I think Senator Laffen has made a very profound point that needs to be addressed. If we're going to work on this, something that is natural, the political subdivision should not have an obligation to even remove the hazard at that point. The situation we were seeing was a man-made obstruction and hazard; that distinction needs to be put in there, even if they are notified of the hazard in the right of way.

Senator Andrist: Maybe we should transfer responsibility to the property owner that created the hazard. If a landowner creates the hazard on a section line, he is required to put the warning signs up.

Senator Lee: I don't disagree with that, but I am back to wanting to make sure that they don't have a higher level of liability than the state does. I think that comparison is critical here and I would be delighted if you talk to Mr. Trenbeath about that.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
January 27, 2011
13514

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to subdivision liability

Minutes:

You may make reference to "attached testimony."

Senator Andrist opened SB 2161. Committee discussion

This was on unimproved township, or unimproved section line, immunity for townships. After consultation with the Attorney General's office between us we came up with this approach.

Amendment prepared by the Legislative Council for Senator Andrist: Title: 11.0403.01001

In case of the Ellendale situation, that was brought before us, this still would've, in this particular instance it still would've protected the township, but the person who dug that so-called drainage ditch would be given the liability for having created the signage or whatever he did. If it was a township that directed the altering of that section line, then of course, they would assume the responsibility for it. But otherwise we would be granting immunity to the political subdivisions for this.

Senator Andrist: Any questions about the amendment?

Senator Olafson: I spoke with Mr. Birst from the Association of Counties and Mr. Spilde. They were also going to work on some amendments for our consideration. I would request that we certainly keep this under consideration, but also wait until we get there, the amendment that they will be working on and we can consider both.

Closed committee discussion on SB 2161


2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
January 31, 2011
13612

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to obstructions in highways.

Minutes:

You may make reference to "attached testimony."

Senator Andrist asked the committee for further discussion on SB 2161. We have three amendment choices for SB 2161. The one I presented earlier, whoever alters to creating the hazard, and it is the responsible person and only that person? Mr. Spilde adopted that language except it also incorporated in ruts that may have been caused by people passing over the prairie trails. It would give them immunity from those too. Senator Olafson's amendments would place the responsibility both on the person who altered the section- line and on the township officers if they had been notified in writing of the hazard and failed to take remedial action. I am comfortable with any of these three alternatives.

Senator Olafson: I think we're dealing with some very important issues here and we need to take the time to walk through this slowly and carefully. I would like to see the direction we would be to put some responsibility on an individual who creates the hazard on a non-improved section line. I think it also is appropriate that when there is a man-made hazard on a non-improved section line and a supervising body, whether it's the county or the township has received noticed in writing of that hazard, and they chose to do nothing about it, then there is liability. But in the absence of that, if it is a natural occurring hazard on a non-improved section line, there is no liability for anybody. It only kicks in if it's a man-made hazard and there is notice and nothing is done. It seems to me that's' fair. Somehow we should try to combine those two principles, the person who creates the hazard as in your amendment Mr. Chairman, its' solely on the person who creates the hazard. I think they do have a liability if that is the case.

Senator Andrist: The amendment that comes from Mr. Spilde, it's not really my amendment, but he's drafting it at my direction. **Senator Andrist:** It adds the caveat that they are notified in writing; **Senator Olafson:** Correct, but it does not address placing liability on the individual who created the hazard; ff that is not the township itself. I think we need to meld the two. Mr. Spilde brought to my attention 24:12-01 and 24:12-02 which has been printed for the committee to review and he suggested looking at 47:01-23. If you look at 24:12-01 the title of it is Injuries to highways or right of ways. Is an un-improved section line a right of way? This chapter says highways and we're not talking about in the bill. Also in

24:12-02, Obstructing highways is the title, but then in the language it talks about right of ways, plowing up, but neither of these chapters are intended to be relevant, they should not be relevant to the bill we are considering. We're considering un-improved section lines. If you go to 47:01-23, it says, "A land owner may not be held liable for a claim resulting from the use or condition of a road across the landowners' property." Again, we probably need some clarification from people who are in attendance if that has any connection to unimproved section lines, over which townships have jurisdiction of course.

Senator Lee: Would someone remind me what Mr. Trenbreath in the Attorney General's office said. I still have an underlying concern having significantly different liability in place for townships in a situation like this than the state has. I get what we're talking about with the unimproved section lines, but do either one of these try to provide any synchronization or consistency between the state's liability and the townships? I don't think the townships should have more, tell me please what? **Senator Olafson:** If you look at the immunity from liability currently in place for the state; that is on all unimproved property. So that is much broader liability than what we are looking for here. I think if you expanded that to all of the political subdivisions then you would be dealing with immunity from liability for cities or counties. Example given.

Senator Lee: I need to see it clarified again. I remember when sovereign immunity went away which pretty much means that other political subdivisions don't have it. I am looking for the townships to have more responsibility than the state does. But I don't recall what Mr. Trenbreath said, that is why I am looking to have my memory refreshed. We need to have some consistency with what the liability issues are for other political subdivisions. It should be appropriate but it shouldn't be in conflict with what the situation is for other political subdivisions.

Senator Andrist: Discussed with Mr. Tom Tenbreath, where he said, that it was pretty complex issue, he thinks.

Senator Laffen: It seems what were saying would agree with each other. If the state's immunity or liability is for unimproved property, it is exactly what we're saying. The liability for the political subdivisions only kicks in when there is an improvement made by man. I think those two align. The unimproved rights of way would they always be the liability of a township or could there be cases where it could actually be a county. It could be a former road, lets' say, a county road. It had been taken out, so now it's' been returned to nothing but natural right of way. The county maintains the right and the liability for that.

Senator Olafson: The townships would have the liability when there is an organized in the county, but some counties in the state do not have organized townships, so then it would fall upon the county to do it. **Senator Laffen:** Example shared with committee. Any subdivision could have the liability on a road I am not saying it's a township deal. **Senator Olafson:** Well no, it could be in all cases it would be either township or county.

Larry Syverson, representing the North Dakota Townships Officers Association gave a response to the committee.

Senator Laffen: there would be no liability if it's in a natural state, the next liability kicks in as if whoever made the improvement it's their liability and the political subdivisions liability only kicks in when they have been notified of the hazard.

Senator Olafson: If the committee would be agreeable, have the opportunity to work with Association of Townships, the Counties and Mr. Spilde to see if we can bring all of these concepts into one good amendment.

Senator Andrist: Is it was okay with the committee to confer with the above parties to prepare the amendments? Committee agreed to have this prepared for next week.

Senator Andrist: Closed the committee discussion on SB 2161.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
February 3, 2011
13916

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to political subdivisions and to amend and reenact section 24-06-31 of the North Dakota Century Code, relating to obstructions in highways

Minutes:

You may make reference to "attached testimony."

Senator Andrist opened SB2161 for committee discussion.

Senator Olafson brought amendments for SB2161. Amendment is 11.0403.01002 (Senator Olafson explained each section of the amendments).

Senator Laffen: So you've been notified, or the subdivision has been notified, and they've ordered the farmer to restore it. Until the time frame and it is done, who's liable? Probably both. **Senator Olafson:** The political subdivision would not be liable because they have taken action to correct the hazard. **Senator Laffen:** But they were notified and it's still there. **Senator Olafson:** They also could mitigate the hazard by putting up warning signs. **Senator Laffen:** They could? **Senator Olafson:** Yes, and I discussed that with John Walstad. I discussed specifically the word "mitigate" with John Walstad. I suggested the word mitigate the hazard, he thought that was a good word to use. The online dictionary definition of mitigate: means lessen or to try to lessen the seriousness or extent of. Mr. Walstad suggested that we might consider entering that definition into our committee minutes and stating that is our intent, and our understanding of the word. Mr. Walstad believed that 'to mitigate' could also include to put up warning signs, warning of the hazard or it could mean to correct the hazard or return it to its original state. He said he thought either one would be construed as being an effort on the part of the political subdivision to mitigate the hazard.

Senator Andrist: I expressed to Senator Olafson, two small concerns. This action goes beyond or this amendment would go beyond requiring them to warn, it would say they would have to mitigate the hazard. We've also introduced language that provides some responsibility for rutted trails even though these aren't roads, because he's kept them altered by the use of man. So my preferred solution is if we would do this, and I would personally be just as comfortable just to give the townships the immunity they seek, but, I could be more comfortable with this amendment if we eliminated in part 2, the words 'or man induced', so we would make it clear that we're talking just about man-made hazards. I

would like language in item B, instead of saying requiring the township to take action and mitigate the hazard, to provide adequate warnings saying the trail has hazardous conditions. When I talked with Senator Olafson, he proposed we put a 'or' in there. I could be persuaded in that too. But it seems to me what we're trying to do to protect the township in a legal issue.

Senator Olafson: 'to provide adequate warning' is a grey area', **Senator Andrist:** Adequate is a grey area. **Senator Olafson:** And the word trail should not be in there, it should be congressional section line. **Senator Andrist:** Yes. **Senator Olafson:** Because it is not a trail. It is an unimproved section line. **Senator Andrist:** I agree with that. **Senator Olafson:** I did indicate to Senator Andrist this morning that I did not discuss 'man- induced' language with Mr. Walstad. But I think what he is thinking of there. Example shared with committee. **Senator Andrist:** My concern is that these are not roads and people traverse them, they can create ruts. Example shared with committee. **Senator Olafson:** I think we can compromise on the wording on B, to make it clear that these subdivisions have two options. If they are notified of a hazard to either correct it, return to its original state so it's not a hazard, or to provide warning that the hazard exists. The word warning would be for the courts to decide if the warning that was there was adequate. That is up to the townships or counties to make sure that it would be considered adequate. I don't think we should put the word adequate in the bill, just put provide warning.

Further discussion continued on this bill, with examples to clarify this bill and reference to unimproved section lines and roads.

Senators Olafson and Laffen looked at the three different classifications for a section line; improved road, minimally maintenance road and an unimproved section line. **Senator Laffen:** Improved roads are the ones we all know that we drive on and create; minimally maintained is exactly what we've been talking about. It was once a road, now we no longer treat it as a road and its' not maintained and you travel at your own risk. The only way you get out of liability for that kind of road is to put up a sign that says it minimally maintained.

Senator Andrist: Immunity would not apply to a minimally maintained road. **Senator Laffen:** That's correct, but Senator Dotzenrod is still asking about the minimally maintained. **Senator Andrist:** But this immunity doesn't deal with that at all. **Senator Dotzenrod:** The situation with the law suit was that the middle category road from what I was hearing from the people. **Senator Andrist:** Then we had a misunderstanding about that then, because I was under the impression that this was an unimproved not a minimally maintained road. **Senator Olafson:** I am looking at 24:07:03 right now, 'in all townships the congressional section lines are considered public roads open for public travel to the width of 33 ft on either side'. If you look at 2161 what we're doing here is saying that highway or public-street does not mean a congressional section line as described in 24:07:03 which is unimproved or unmaintained. What that would seem to do is change that definition. There is also language in there where a Board of County Commissioners can declare the section line closed after a public hearing and a finding.

Senator Lee: I thought there could have been a road that was minimally maintained and the township says were not going to have anything to do with that anymore and they can, as an organized township, can say okay, that isn't just going to be minimally maintained,

we're going to return it to being an unimproved section line. At that point, it's doesn't meet these other criteria, but that would mean that sometime it would've been improved, minimally however, so I think it probably has to be or unmaintained because if 50 years ago it actually was used more because there were more farmers in that area, for example, they don't use it anymore, and the township has said since no one is using it, we aren't going to maintain it, we're not going to do anything with it anymore but there was at one time, something that would have been a minimally maintained road. But in this case, don't townships have the right to really return it to unimproved congressional section line if it's not being used?

Senator Laffen: They do, but it's never an unimproved road unless they can get out of having to maintain it, and can get out of the liability but they have to put up that sign.

Senator Lee: But I think it is "or unmaintained" because otherwise wasn't there going to be some discussion about whether or not at one time it was improved, even to a minimal level? **Senator Laffen:** That is a different category. **Senator Lee:** I get that; but if you're moving from a different category down to this basic Garden of Eden level. **Senator Laffen:**

You never go down to that level. You only get down to the middle class. **Senator Lee:** Okay. So you can never go from anything that had regular traffic on it, to an unimproved section line. You can only go up from an unimproved section line, you can never go down.

Senator Laffen: Correct. **Senator Lee:** Okay, because I thought they could say as townships officers we are no longer going to, and I realize it gets to the unmaintained.

Senator Laffen: They can say it, they can downgrade to the unmaintained and they can't go beyond that. **Senator Andrist:** But I think they can close it. **Senator Olafson:** There is a process for that. **Senator Andrist:** Then all they have to do is post the sign, saying road

closed. **Senator Laffen:** Once you've made a road then you never get out of a solid road.

Senator Dotzenrod: I really had thought that some years ago we had really solved this problem with the townships because some of these roads that I mentioned earlier are all over the place. The townships for the most part put those signs up that said minimal maintenance road. I thought at that point we really solved the problem in townships. They put the signs up, now there is nobody who can go to court saying there was a cut across that road, I am going to sue you. The township says we got the sign up, it's a minimum maintenance road and you're supposed to stay off and travel at your own risk, then they are off the hook. Is that correct? **Senator Olafson:** Yes. **Senator Laffen:** The problem is that you've never dealt with the ones that were never a road. **Senator Dotzenrod:** In the part of state highway then, they are hard to find. **Senator Olafson:** Yes. We do have several miles in my township of unimproved section lines that were never touched. **Senator Andrist:** Yes, we do in our part of the state too. All we ever had was trails. But the point you raised Senator Dotzenrod is if you want to provide some immunity for improved section lines or closed or minimally maintained you would have to do that, I think by a separate provision, because I don't think this bill would give anybody any immunity on those roads that you say are prevalent in your part of the world. **Senator Olafson:** Example cited. Does the township have a responsibility to warn people of that hazard? **Senator Andrist:**

According to the language in your amendment, I think it would. **Senator Olafson:** No. They don't. **Senator Andrist:** Somebody has told them in warning. **Senator Laffen:** No, never.

They would never have too. **Senator Olafson:** It's a natural hazard. It's a hazard, it's been there for centuries. There's a hypothetical example: does the township have an obligation to warn people of that hazard? **Senator Andrist:** What concerns me is "man induced". I could see somebody going into that gorge and doing something to serve it, and just

opening up an extra can of worms. **Senator Olafson:** I don't have a problem with taking out the 'man-induced'. **Senator Andrist:** Good. If you take out the man induced, I can work with you on the rest of the language. **Senator Laffen:** I want to go back where it says "with regards to a congressional section line" which is unimproved or unmaintained. I wonder if "or maintained" doesn't confuse us into the other categories? **Senator Andrist:** I think it does too. **Senator Olafson:** We could probably take out the 'or unmaintained. **Senator Laffen:** "Or" means unmaintained, you can't take out. **Senator Laffen:** Just unimproved. **Senator Olafson:** Remember what we're doing with the bill. If you look at the original bill, the language on lines 10, 11, 12, is still in the bill. That's important because currently 44:07-03 says that it is a road open for public travel. It still doesn't change that fact but it describes what the changes the meaning of what they call a road. Here we've got highway or public street. We should ask Mr. Walstad about that. I see they are identical definitions. **Senator Andrist:** Please repeat what you just said. **Senator Olafson:** Currently, in 24:07-03, 'in all townships the congressional section lines are considered public roads open for public travel'. Highway or public-street does not mean a congressional section line. **Senator Laffen:** Because of what it is saying is this piece that we're working on comes out of the Obstruction in Highway piece. It goes on to say these congressional section lines are not part of a highway or public street. **Senator Andrist:** The new language takes out the unimproved section lines. **Senator Olafson:** What's really relevant here though too is that it looks at 24:06-3, so it takes away that. **Senator Andrist:** Anything that 24:06-31 requires you to do; the congressional line is an exception to it. **Senator Olafson:** I think that's okay. **Senator Dotzenrod:** Please make sure the middle category classification of roads is not a congressional section line. **Senator Olafson:** We'll ask Mr. Walstad about that. **Senator Laffen:** Actually, if you added there, that would actually put that in this category which we don't want. We don't want this do we? We don't want the minimally maintained roads to have the immunity from liability, so we added it in there. We want to exempt them. We want them to be liable for all their roads, with the exception of these undeveloped areas that are now falling under this, or just this one? **Senator Dotzenrod:** If we added them, wouldn't they be excluded from the consideration of the congressional section line? **Senator Laffen:** No, because that's the piece that's adding in to this. **Senator Dotzenrod:** On line 10, highway and public streets or unimproved or minimally control would not meet the congressional section lines. **Senator Olafson:** Which is unimproved? **Senator Dotzenrod:** Yes. **Senator Laffen:** That's the piece that is exempts the liability, so if you put them in there, they are exempt from liability. We don't want the minimally maintained roads. The way the testimony was presented here that day, at least the way we thought it was this occurrence had happened on one of these undeveloped roads. **Senator Dotzenrod:** (Referring to the testimony concerning the court case) I found it unclear in the testimony we had. I didn't know that we really got enough information for us to really be able to determine for myself what was out there. The pictures showed the stakes in the road after the accident happened and they looked kind of like there was a road surface there, but you really couldn't tell. I really wanted to find out, because I had the impression that this could've been one of those roads that was an improved road at one time, but I didn't have it very clear about that. **Senator Olafson:** I apologize too, but that was my understanding, it was a totally unimproved section line. Without respect to that, it doesn't change what we want to do here, and in fact when you tell us that now, and we have more accurate information, that better explains why the court case came out the way it did. **Senator Lee:** Example given with a response from several committee members. We have to be really careful that we're not eliminating any responsibility from a person who's

travelling at whatever time of the day or wherever the place. **Senator Andrist:** That's what prompted me that I just could have just this bill without playing with it, because I feel strongly that there has to be some responsibility. **Senator Olafson:** What my goal has been all along in trying to develop these amendments and argue my point and position before the committee has been to strike a balance between personal responsibility and the responsibility that should rightly rest on the shoulders of elected officials when they know that there is a problem that has been created by man. I've been trying to strike that balance, and I think this makes sense to me, it's logical. I think it puts responsibility where it belongs. If there is a natural hazard the responsibility, ought to rely on the person who is wandering cross country on an unimproved section line. **Senator Laffen:** Example shared with committee.

Senator Andrist closed the committee work on SB2161.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
February 8, 2011
14023

Conference Committee

Committee Clerk Signature

Mg. Wocken

Explanation or reason for introduction of bill/resolution:

Relating to political subdivision liability, relating to obstructions in highways.

Minutes:

You may make reference to "attached testimony."

Senator Andrist opened the committee work on SB2161.

Senator Olafson explained the proposed amendments for SB2161. Senator Andrist: Well we removed those two words in that subsection 2, 'man induced'.

We put Senator Olafson language and my language both in Subsection B. **Senator Olafson:** The net effect of that will be to give the political subdivision the option to either repair the hazard, return it to its original condition or to provide proper warning. They have an option. (Example shared). We decided not to qualify the warning by saying proper or appropriate or anything like that, just to provide warning. **Senator Andrist:** It only comes into play if they receive that written notice. **Senator Olafson:** Correct. **Senator Andrist:** So they are aware of it?

Senator Olafson Moves the amendment
2nd by Senator Laffen
5 Yeas, 0 No, 0 Absent

Committee discussion continued.

Senator Olafson moved Do Pass as amended 2161
2nd Senator Laffen
4 Yeas, 1 No, 0 Absent
Carrier: Senator Olafson

Committee Discussion:

Senator Dotzenrod, the subject matter of this bill is really confined as I understand it, to these congressional section lines. It is not going to deal with any of the responsibilities that the township officers have on roads that were at one time being used and are no longer in use. **Senator Andrist:** That's the understanding that the rest of us had didn't we? **Senator Dotzenrod:** I don't know if we have a problem on these roads, on these congressional section lines. I don't know, we have a bill in front of us that deals with the questions of a responsibilities and liabilities that township officers have on these congressional section lines; these areas that were never improved. So, its' pretty clear what, and it spells out those obligations have and don't have, but my concern is its' an area that I don't there's a problem. I don't know of any history where we've had trouble in this area. **Senator Andrist:** Well I know this is a concern of yours, maybe you would like to in the days ahead. That has never really been on the table, as I understand in this bill. Maybe you'd like to talk to Steve Spilde and Ken and others and see if there's or others in the business that would like to have the House consider an amendment to do something for immunity on abandoned roads or whatever the language would be. I don't think at this point we should get into that territory. **Senator Dotzenrod:** I am satisfied in the current law that we have right now on these roads that I am thinking about, the roads that were improved. I think it's satisfactory. The townships have available their tools they need if they're concerned about liability exposure, they can fix that fairly easy, and most of them have with all these signs they have put up. I am not to certain that we have a bill that really deals with an issue that I see on these kinds of section lines that are. **Senator Andrist:** You might, this of course is your choice, but you might consider if not turning the baby out with the bath water, if it doesn't go as far as you think it should go to because if we pass it, you keep it alive and you got a chance. **Senator Olafson:** What I hear Senator Dotzenrod saying is that he is not convinced that there really is a problem out there on the unimproved congressional section lines. Is that correct? **Senator Dotzenrod:** That would be correct? **Senator Olafson:** If that's correct and we pass this bill and it won't have any impact anyway. **Senator Dotzenrod:** I understand that and I could vote for it on that assumption. **Senator Andrist:** We're not trying to break your arm either. **Senator Dotzenrod:** I just know that in my district there is a concern that 2161 is a bill I would probably going to vote no and I am not going to speak against it.

Roll for 2161
4 Yeas 1No 0 Absent
Carrier: Senator Olafson

Date: 2/4/2011
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2161

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number 11.0403.01003

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: 2/4/2011
 Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2161

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) 4 No 1

Absent 0

Floor Assignment Senator Olafson

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

REPORT OF STANDING COMMITTEE

SB 2161: Political Subdivisions Committee (Sen. Andrist, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2161 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "a new"

Page 1, line 1, after "subsection" insert "7"

Page 1, replace lines 13 through 17 with:

"SECTION 2. Subsection 7 to section 32-12.1-03 of the North Dakota Century Code is created and enacted as follows:

7. a. With regard to a congressional section line, as described in section 24-07-03, which is unimproved, the political subdivision that has jurisdiction over that congressional section line:
- (1) Is not liable for any claim based on a naturally occurring hazard regarding that congressional section line; and
 - (2) Is not liable for any claim based on a manmade hazard regarding that congressional section line unless:
 - (a) The political subdivision is notified in writing that the hazard exists; and
 - (b) The political subdivision either fails to take action to mitigate the hazard as soon as is practicable, but not to exceed ten days, after the written notification, or fails to provide warning that the congressional section line has a hazardous condition.
- b. Except as provided in paragraph 2 of subdivision a, any person that creates a hazard by altering a congressional section line is liable for any damages caused by the alteration.
- c. The political subdivision may seek an order directing the person that alters a congressional section line to restore the congressional section line to its original state."

Renumber accordingly

2011 HOUSE POLITICAL SUBDIVISIONS

SB 2161

2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

SB 2161
March 3, 2011
Job # 14911

Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to obstructions in highways.

Minutes:

Testimony #1, 2, 3, 4, 5, 6, 7

Chairman Johnson: Opened the hearing on SB 2161.

Senator Gary Lee: As you know the public land survey system is a way of subdividing and describing lands. Lands in ND are subject to subdivision by this rectangular system. This system typically divides land into six mile square townships and they are divided into 36 one mile square sections. In ND these sections are considered public roadways open for public travel as defined being 66 feet wide. But ND probably has thousands of miles of unimproved and unmaintained section lines. In recent court cases political subdivisions have been held liable for injuries that have occurred on these unimproved unmaintained section lines. In many cases the accidents have involved recreational vehicle. The Senate political subs committee did a nice job in putting some friendly amendments on this bill. It seeks to modify the definition of highway or public street and address and address the liability issue. In Section 1 of the bill it includes that new definition and this would not include a section line that is unimproved or unmaintained. In Section 2 this addresses the liability for claims and a process for clearing an obstruction on these unimproved or unmaintained section lines. That really includes my intent in terms of introducing the bill and there are others that will testify to it. One of the political subdivisions people is here from the Senate who offered the amendments and can explain those completely to you as well.

Senator Olafson: I am in a district where there are a lot of unimproved congressional section lines. I thought it might be helpful to you and the committee to get some sense of the amendments that we put on the bill and what you have before you today and our rationale for what we did in the Senate political subdivisions committee. The bill as originally introduced provided complete and absolute immunity from liability on unimproved section lines. I want you to keep that phrase in your mind. We are talking about section lines that have never been built up or improved for public travel. This will address section lines that are as nature put them there. Our committee thought that went a bit too far to have no liability. So the amendments I worked on and submitted to the committee and the committee did agree to these amendments. What the amendment did is it provides

immunity from liability if there is a natural hazard. If it is exactly the way nature put it there or natural creates the hazard then there is not liability. Let me give you an example, but it exists just a couple of miles from my ranch headquarters. We have three miles of unimproved section lines contiguous. There are boulders in that section line that would eat a pickup truck for breakfast. There are cottonwood trees; washouts and at one location there is a river tributary which has an 80' vertical drop right on the section line and it has been there for years; everybody knows about it, and if you steps over the side you would be dead. Everybody knows about it and you can see it and it has been there for centuries and our committee thought a hazard of that type should not cause a political subdivision to incur liability if someone is injured. What we did is if there is a hazard which was originally created or caused by the activity of people and the political subdivision is notified of the existence of the hazard and they chose to do nothing to either warn of the hazard or to correct the hazard then they have liability. We thought this was a reasonable compromise. It is a compromise between people having some individual responsibility for their own actions when they go off wandering across country on an unimproved section line. It is a compromise between that and elected officials in political subdivisions having a responsibility when they know of a manmade hazard and failed to do anything to mitigate the hazard. We also added in on page 2 line 5; we thought it made a lot of sense that the person who creates a hazard on these section lines should also have some responsibility and have some liability. On line 8 the political subdivision may seek an order directing the person that alters that alters a congressional section line and what is implied and creates a hazard to restore the congressional section to its original state. We worked on the bill to provide a reasonable compromised to provide individual responsibility and the rightful responsibility of elected officials who are notified of the existence of a manmade hazard.

Rep. Koppelman: What is the definition of a congressional section line?

Senator Olafson: A congressional section line would be any section line of any township. I don't think the definition is specific to whether it is improved or not. An improved township road would be considered a congressional section line.

Rep. Koppelman: So it is any line marking any square mile. On page 2 item c there it says the political subdivision may seek an order directing the person that alters a congressional section line to restore the line etc. Seeking an order is that saying they can go to court and request the court to issue an order or what are you intending with that language?

Senator Olafson: My understanding would be they can issue the order themselves. This was legislative council language and that question would better be answered by them. The explanation was they could issue the order themselves.

Rep. Hatelstad: On the bottom of page 1 line 22, political subdivision notified in writing. Most individuals carry a cell phone and if they uncouncted a hazard why couldn't they just pick it up and call a township officer?

Senator Olafson: That is an excellent question. The reason we provided for notification in writing that eliminates the he said she said. That takes away the question of where they

notified and did they know about it. I guess if you thought that wasn't reasonable you could make a good argument to just notification whether it is in writing or verbally would suffice.

Rep. Hatelstad: On page 2, line 10 basically when Rep. Koppelman when they talked about an order directing the person, normally you see in that situation either you fix it or we will fix it and bill you. Is there a reason why that part wouldn't be added on there? If you don't do it we will do it and bill you.

Senator Olafson: I think that would be a good addition to the bill. I would have no argument with that. That is probably something that should be included.

Rep. Klemin: First of all on line 16 on page 1 it talks about the political subdivision that has jurisdiction? There may be more than one political subdivision that has jurisdiction over a congressional section line road. For example township or county could both have concurring jurisdiction, I would think.

Senator Olafson: You used the word road. We are talking about unimproved section lines so the question about who would have jurisdiction; it would either be a county, if it is an unorganized township they would have jurisdiction over that line.

Rep. Klemin: It has been reserved under congressional section lines were reserved for roads whether there is one there or not it is still a right of way for the public to use. On line 20 manmade hazards it gave some examples of natural occurring hazards but you didn't give any examples of manmade hazards. What did you have in mind?

Senator Olafson: If someone went out and wanted to drain water off their land and they dug a short drainage ditch across the section line that would be an example of a manmade hazard. It could be leaving a piece of equipment parked in the section line that could create a hazard. It could be leaving a hay bale.

Rep. Klemin: How about a fence line down the middle of a right of way?

Senator Olafson: Yes there are many places where there are fence lines that are within the congressional section line. There may in fact be one or two in Pembina County that I am aware of.

Rep. Klemin: What about planting crops right up to the section line. It would be within the right of way. Would that be a manmade hazard?

Senator Olafson: I think it would be argued that it could be a hazard. We can get into a hundred hypothetical.

Rep. Klemin: Line 22 a political subdivision is notified in writing. There isn't anything in here about proof of notice being given. Without a proof of notice requirement you might have the same thing with written notice. What did you have in mind there?

Senator Olafson: I think if the Senate and House would agree that the notification in writing is a good part to maintain in the bill then I would certainly favor proof of notice being included. That could be done by certified mail receipt.

Rep. Klemin: Page 2 line 5 b except that is provided on page two of subdivision a and I am looking at Paragraph 2 of subdivision a and I don't see anything there relating to a person.

Senator Olafson: I am not the trained attorney in the room, but I would say that there doesn't have to be a reference to person in Subdivision 2. The person they are referring to is the person that creates the hazard.

Rep. Klemin: I don't see in Paragraph a where a person is referred to; it is only a political subdivision. Unless a political subdivision would be considered a person. On line 6 on page 2 and also on line 8 on page 2 the word altering; I am having a little trouble there because it seems to be that the congressional section line is there whether you obstruct it or not. The line is never going to be moved. Therefore the line itself cannot be altered.

Senator Olafson: It is obvious to me that altering means to make a change in the structure of the line itself. It does not mean moving the line. If you could suggest a better word I would not object to that to make it more clear.

Rep. Klemin: The way this reads to me on an order; you indicated the political subdivision itself could issue an order directing the person to restore the line. That might be appropriate, but the way it says may seek an order I sounds like you have to go to court.

Senator Olafson: I think that could be worded in a better way.

Rep. Koppelman: It appears we are trying to deal with cleaning up these lines or having notice for hazards etc. the bill so makes a pretty major shift in liability. It basically absolves the political subdivisions of any liability if they jump through a couple of hoops which might plan to face a little bit of the whole sovereign enmity debate and it also specifically creates liability on the part of someone else. An individual where it may or may not have existed before. That is the intent?

Senator Olafson: Yes that is the intent to make someone who intentionally creates a hazard for the public to include them in the loop of liability as they should be in my opinion.

Rep. Kretschmar: In the new language on page 1 line 10-12 it doesn't include a congressional section line which is unimproved or unmaintained. Below in line 16 you just say which is unimproved? Did you deliberately leave out unmaintained down there?

Senator Olafson: We had that decision in the Senate committee and if I had my way I would have taken out the or unmaintained on lines 11 and 12 because that to me confuses the issue, but I was not able to get the rest of the committee to agree with my position on that. I would like to take our or unmaintained because an unimproved section line is just that.

Rep. Klemin: Going back to page 2 on subdivision c; where you thought it might be appropriate for the political subdivision to make the repair and bill the cost to whomever, but other than the landowner what kind of authority do they have to charge other third person and how would they do that?

Senator Olafson: That is something we discussed in committee. What if the hazard created wasn't the adjacent landowner. So we had originally talked about possibly having a provision for levying on taxes on the real estate, but we thought what if it is not the adjacent landowner or even a property owner. So I think the best thing we could come up with is the political subdivision would, if they did repair it themselves, bill the person who created the hazard. Their only remedy if it wasn't paid would be small claims court, I would assume.

Rep. Klemin: what happens when you have a hazard there and you don't know who did it? Is the political subdivision going to repair it and just absorb the cost?

Senator Olafson: I don't know what other alternative they would have. Yes they would have to cover the cost of it. I don't know of what other alternative there would be.

Aaron Birst, Association of Counties: (See testimony #1).

Rep. Koppelman: Under what current law would a landowner be immune and a political subdivision be liable and does the language of this bill totally reverse that in terms of individual responsibility?

Aaron Birst: It does reverse that. If the interpolation in the Kappenman decision is correct the ND Supreme Court cited the ND Century Code 47-01-23 which indicates the landowner may not be held liable for a claim resulting from the use or condition of a road across the landowner's property. Just so you are aware the decision is 2009 ND 89. It is a lengthy decision because it goes through a bunch of these issues. To give a rule that the Supreme Court came up with in that case is we therefore conclude that a township board with actual knowledge of unusually dangerous or unusually hazardous condition of an unimproved section line road has the duty to warn travelers of that condition. They did not say it has to be improved; they simply said there has to be warning. For our purposes that leaves still a lot of unanswered questions on the warning.

Rep. Koppelman: In ND we have a lot of different types of landscape. In the eastern part of the state there is a road every mile. Every section line has some more improved than others, but there is a road there. I know as you get further west and in other parts of the state that is not the case at all. In many places you can go miles and miles without having a road or anything visible that looks like a section line. What is the responsibility in terms of what constitutes a section line and also what that means. Does it mean the landowner can't plant a crop there or what?

Aaron Birst: Under current law every square mile within 33 feet of every section line has to be open unless closed through that county procedure. Additional under the law you can not obstruct a section line. If you put up a gate on a section line and they have not gone through that county procedure to close that section line that is illegal. If somebody got hurt

at least when somebody strings some sort of trip wire across there or the county or township is put on notice. In those cases there is the duty to respond.

Rep. Koppelman: If they go through this procedure that is in law now; if they get the section line declared impassible or not longer a section line or whatever the procedure is; what does that then mean and how does the public know that?

Aaron Birst: There is no requirement that the political subdivision puts up any notice. It is simply the landowner blocks it off; typically with cattle grazing fence and then it actually gets recorded in the recording system. So that line is forever more closed off.

Gary Thune, General Counsel, ND Insurance Reserve Fund: (See testimony #2) filling in for Steve Speldy who recently broke an ankle and is immobile at the present time. I was not involved with the Senate side and do not have the background that others do but would promised those of you that have questions I can get answers for those questions.

Rep. Klemin: This Kappenman case imposed a duty to warn of an unusually hazardous or dangerous condition. How have the political subdivisions exercised that duty to warn since the time of that case?

Gary Thune: They would be signing those that they have knowledge of notice about and I have no knowledge whether those types of things have been done since then.

Rep. Klemin: It may be likely that political subdivisions have done nothing?

Gary Thune: I doubt they would have done nothing had they received actual notice of those issues, but the Kappenman case does talk about actual notice. It does not say go out and sign all of them where you know there is a hazardous condition. It is if you have actual notice of that and therein lies the problem with the vast numbers of miles of township roads many of which are congressional section lines which have not been improved. It is virtually impossible to patrol all of those and identify without actual notice has been received. I can't tell you whether political subdivisions have received actual notice or not. I do not have that information.

Rep. Klemin: Was it actual notice or actual knowledge?

Gary Thune: I believe it talks about actual notice.

Rep. Klemin: So then someone had to provide notice or they would have to come upon it themselves, say the township supervisors?

Gary Thune: The county or township does not have a duty to maintain an improved road on each section line in order for a county or township to be held legally liable for injuries to person using a portion of the designated public road which the county or township is not undertaken to improve. The issue as I understood it in Kappenman that one of the factual issues that they defeated summary judgment on was whether or not there was actual notice. As I recall the facts one township member did not recall receiving notice and the

other one said he did. The Supreme County did not decide whether there was actual notice there, but said it was a fact issue.

Rep. Klemin: There was some discussion previously with Senator Olafson about the political subdivision being able to issue an order to repair or remove the obstruction or whatever it is on a congressional section line. Is that something that would be within the power of a political subdivision to issue that kind of order itself or would it be required to go to court to get an order?

Gary Thune: The way the bill is written now I would think the county commission wouldn't have the authority to do that. I assumed that you would have to go to court to get that order the way this bill is written now.

Rep. Klemin: If we amended it to provide that the political subdivision could issue the order itself; is that something that would be normally within the powers of a political subdivision?

Gary Thune: I think if it was in the statute stating until somebody found it to be unconstitutional or not lawfully enforceable it would certainly clear that part of the bill up. I agree with Sen. Olafson that there is a need for some attention given to that. One court go to court to try and collect, but as the bill reads now I think there would probably be a challenge in some court over what that language means.

Rep. Koppelman: In the Kappenman decision did the court invent new law or were they interrupting another section of code in reaching that decision?

Gary Thune: They found that there were fact issues from the two court cases that we now have a new standard and that is what brought about this bill.

Rep. Koppelman: Page 2 of the bill lines 5-7 and looking also at 47-01-23 to which Mr. Birst referenced earlier does this conflict that or how would you hold those two in contentions? Do you see those two conflicting if we pass the bill as written and how could we resolve that if so?

Gary Thune: That is an issue that I have not reviewed and looked into. We will get an answer to you.

Rep. Klemin: How does this bill affect an incident that may have happened on that deviated portion of the trail and it is off the section line? Does this not affect that at all?

Gary Thune: The fact issue involved there is it more than 33 ft. off the section line. Whether this bill would affect that depends on whether it is on the section line or not.

Rep. Klemin: It could be if there is an accident that happened on the trail that was not on the section line itself than this bill wouldn't probably apply at all.

Gary Thune: I think there would have to be a determination since we are talking about the congressional section lines.

Larry Syverson: (See testimony #3). Also handed out Ken Yantes testimony since he could not be here. (See testimony #4).

Rep. Koppelman: Page 2, lines 5-7; in your reading of that and your intention as a representative of the political subdivisions do you believe the person could include political subdivisions there? The word person doesn't mean a human being; it can mean a corporation or other entities. As you read that do you think that could apply to a political subdivision just as much as a person or a land owner or someone else?

Larry Syverson: are you wondering if the township could be causing the problem themselves? The township would be liable for their own actions in any case.

Rep. Koppelman: I am not sure that is true if you pass the bill as written and if you look at the bottom of page 1. I think it pretty well insulates the township from any liability so that is why I am asking if the township is also included in this page 2 portions that establishes liability? It says any person that creates a hazard by altering a congressional section line is liable for any damages caused by the alteration. Most of us first reading that would say that is a land owner or individual coming across doing something etc. but if the township dumped a load of debris there or did something else do you think that includes them in potential liability?

Larry Syverson: That is not our intent to have anything like that as a possibility. If you would see a way to bar that we would have no problem with that.

Rep. Koppelman: I am just asking the question.

Larry Syverson: We wouldn't want to see the township creating problems out there.

Rep. Mock: In result of the Kappenman case from a Supreme Court decision, if a township has no actual knowledge of a hazard on an unmaintained or unimproved section line, is the township held liable if there is an injury or any damage caused by that without actual knowledge?

Larry Syverson: I don't believe they would be in the case sited they had substantial knowledge of the fact and our understanding is a significant amount of time passed but the obstacle in this condition.

Rep. Zaiser: Since that decision was made in the Kappenman case are you aware of any township that has been notified of dangerous or hazardous conditions on a section line and if so what actions did they take?

Larry Syverson: None have been brought to my attention. In our new letter I have sent out I have strongly urged our officers to examine those rights of way and save a life. I believe we have a moral obligation.

Opposition:

Allen Austad, Executive Director of the ND Assoc. for Justice: Today if you look at the Century Code there are over 90 instances of people, political subdivisions, and corporations that are granted immunity. This session we are going to add about 6 or 7 more. Each time that happens someone else loses some of their rights. Some person is going to lose some right when you grant someone else immunity. This impacts people. It just doesn't impact the political subdivision. It has a direct impact on people. They wouldn't have been liable had they not known. They knew and took no action. Why would you purposely exempt them from action? You relieve them totally of their responsibility and we don't happen to believe that is the right action.

Rep. Zaiser: Do you see this case at all differently based on the section line laws?

Allen Austad: I think the key point here is if you know of a hazard fix it. If you don't know you aren't going to be held responsible. If you have caused a problem you should be responsible for it. This alleviates townships from that responsibility.

Rep. Zaiser: This state is full of very extreme topography; do you think it is feasible for the townships to make every section line basically conclusive to driving a motorized vehicle safety?

Allen Austad: I don't think we have that intent. If there is something there that is dangerous and they knew it.

Rep. Devlin: To me you are arguing the bill the way it was originally drafted but the bill as it came to the House political subdivisions is now in the bill to notify.

Allen Austad: It could be a washout that happened yesterday and washed out that township line and somebody tells them that there is a hazard here; they don't have to do anything anyway because it was a natural hazard. It doesn't make any difference if it is a natural hazard. I don't have to do anything anyhow because it is a natural hazard under this bill.

Rep. Koppelman: If we are talking about these congressional section lines what in your view should the public be made aware of in terms of when they approach a piece of land and if they can tell where that section line is, how will they know if it has been closed through this county action. How will they know if they have a reasonable expectation of possibility or reasonable notice of hazard or that sort of thing now or under the bill?

Allen Austad: I don't know if this changes anything. What this bill says is if the township knows there is something there you have to warn people. This essentially says if you know it is there you really don't have to do anything. I don't know how often you would write a certified letter to your township officers? I don't know how else you would notify them. They knew for two years and didn't fix it anyway.

Rep. Koppelman: In current law is that a new or should have known standard or is it a strict standard that they actually had actual knowledge?

Allen Austad: Ask Mr. Blist that.

David Bliss: (See testimony #5). I represented the Kappenman family in their case and I argued the Supreme Court case. I have Mr. Kappenman and his daughter here. They can explain why this bill needs further amendments. As I look at engrossed bill 2161. The Senate modified to manmade hazards their original bill. I think the issue now is any claim based upon a natural occurring hazard. The way this bill now reads it means that the political subdivision, even having notice, has not responsibility for an unusually dangerous natural hazard. Even if this committee would take those sections as to manmade hazards, put them in the natural occurring hazard so that the township has the same liability as those land owners I think we could live with a notice requirement. I believe Rep. Koppelman made some comment whether or not written notice is sufficient. My experience with townships and serving on our own zoning board. Most township members have cell phones and they are certainly not writing letters. I think that creates a factual situation as it did in this case but none the less most farm people aren't going to be writing official letters. It creates more additional problems because let's say farmer Jones writes that note, submits it, and he doesn't have a zerox machine because it will be a question of proof. The township officer can say well I never received that. We have the same kind of proof burdens that we had before. The more advanced stage of certified letters that is even farther away than we are for written notice. For me I think it creates more problems than it might solve having written notice. I think if we go toward a notice requirement that doesn't require those specifics I think we would be farther ahead. What happened in this case is tragic and I appreciate Mr. Birst sympathy when he had testified at the Senate hearing. What we are talking about here is not somebody dropping the front end of a pickup into a trench. We are talking about something so dangerous that it actually killed this 13 year old child who had his helmet on and his chest protector on; and was headed directly down this trail of an unimproved section line. He couldn't see the trench; and dropped into it. Mr. Kappenman found his son in his last hours of consciousness. They air lifted him to the Aberdeen Hospital; he went to Fargo the next morning where he died. The question here is whether or not a township has the responsibility once they know of a hazard that is unusually dangerous; they have to mark it. There is no liability for a township if they don't have notice of an unusually dangerous condition on an unimproved section line. That is the law and I think it is a good one. Township board members are friends and neighbors. Wouldn't you want to give your neighbor some notice? In this case it was a factual issue to whether that was a man made trench or a natural trench. We have five days of depositions on this in Ellendale and we could show it was dug out. There was argument it was natural. Under this law that is before you right now, if it is considered a natural trench even though that township got notice that township would have no liability. A comment from a township officer who finally got around to looking at that site. The reason they got around to looking at that site was the FEMA person had told them we would like assholes if we didn't do something. That is pretty extreme and one of the justices had said that in oral argument. That isn't what most township officers are. Most township people want to do the right thing. The present law under Kappenman requires them to do that only if they have notice of this dangerous condition. That is an important distinction. You are under no affirmative obligation as a township officer to go out there and fix that. If this had happened and there had been no notice to the township, no law suit. We wouldn't have been able to bring this law suit had there not been notice.

Rep. Klemin: I have a copy of the Kappenman case here. What happened there the Supreme Court held 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. So what happened?

David Bliss: The case was settled after the township knew it had liability. The last half of that sentence is my editorializing. This is a case that should have been settled a long time ago. Mr. Mrs. Kappenman should not have been subjected to four years of litigation before the township stepped up to the plate. They had abundant notice of this and they said we are not liable.

Rep. Hatelstad: Did you say the trench was found to have been manmade?

David Bliss: Yes, there was argument by others that said it was a natural trench and what we concluded was that the landowner who owns land on both sides of the section line had dug the trench to drain his land from one side to the other. At the same time that trench would fill up and then water would come through and the issue was that natural or manmade? Our response here today was Brason would have died either way. It doesn't matter whether it was a natural trench or a man made that kid will die and if a township has notice of that let's save our kids. I think the most eloquent testimony was from our township board this morning and he said lets go out and examine and save a life. I couldn't put that any better. If we say on a naturally occurring hazard a township has liability if they have notice. If they don't have notice they don't need to do that. Secondly they don't need to go out and inspect every mile of their state. What about in Western ND where we have many section lines. That is not the issue; the issue is notice. That is a pretty common sense thing to do here in ND in my opinion.

Rep. Klemin: How does township board have actual knowledge? If any one member of the board actually knows about this unusually dangerous condition if that binding upon the board as a political subdivision? What if a prior member of the board had actual knowledge is it binding on a subsequent board?

David Bliss: That is an important question. In the Kappenman case there was a prior township board member who did know about this and we did discuss that with him so that the township as a corporate entity had notice before and a present standing township board member. There was no question that a standing township board member had notice and we had the prior board members testimony. In this particular situation it had been known for years.

Rep. Klemin: If a prior board member had knowledge then that is binding on a future township board member?

David Bliss: That is what I would argue.

Rep. Zaiser: Perhaps one individual might be notified and maybe see it as maybe not hazardous. If they determine say a township officer that it is not hazardous if they get notice they have to treat it as a hazard. Would that be your analysis?

David Bliss: that is an important and difficult question to answer for everyone. That is part of what the law is and that is why we have jury and judges to interrupt those very questions. I think in this case when you have a four foot trench four foot deep in the middle of weeds laterally across an unimproved section line that is an unusually dangerous hazard. Now and then common sense applies to the law. I have advised townships because they have called me on this case I would say use your common sense. If it looks like a hazard the safe thing to do is spent \$10 and put a couple of steel posts in there. That is all you need to do here. We are not talking about massive patrols over all these section lines. Section lines are opened to the public; that is congressionally mandated. We do have travelers here and they are coming back and forth so we can't just think it is just for our own little world.

Rep. Koppelman: In current law the ability in law to define a section line. How does the public know what is what. If the understanding is a section line is every mile and there are no posts there with a warning saying this might look like a section line but how is the public safe and know the current law.

David Bliss: There is a process that Mr. Burst had referred to close a section line. A section line has to be closed pursuant to a public benefit. If you can't show a public benefit you can't close that section line so it is an involved procedure and sometimes it is hard for a county commission to close a section line because you can say will you got two land owners but you still can't tell me why you should close this because it is a public benefit. Not only can a county not easily close a section line; you can't easily foreclose public travel on a section line either. If you as a township board member have a couple of calls, there is a dangerous trench out there, you better get it fixed. Just go out there and put a couple of jugs and steel posts. That is all a person really needs to do. The constitution says everyone has excess to the courts. The flipside is you also have excess to the courts. In other words if you are a citizen like Mr. Mrs. Kappenman, you have the right to excess to the courts and they exercised that right. Now with this law they can do that if it is man made with notice requirements, but they can't do it if it is a natural occurring hazard? That is the difficulty and that is the constitutional issue. We should apply the same standard for man made here and just use it for naturally occurring and I think that would go a long ways toward making this bill.

Rep. Koppelman: Under the bill if the political subdivision is notified they would need to either take action to mitigate the hazard or they need to provide notice so if you are in western ND and you have section lines that are cliff's and bluff's and whatever else so what is what? Is that a steel post and a jug on every section line?

David Bliss: What you have to do is have it out there is there is a hunter in a pickup he sees some red flags on fence posts or he sees water jugs. You can do it simply with very little cost and time. Township officials are out there every spring. They are checking it out and sometimes even with FEMA. We have lots of areas that are flagged every spring. It is not like township officials aren't taking their responsibility seriously.

Rep. Koppelman: On page 2 lines 5-7, item b where it talks about a person creating a hazard and being liable. Would that in your legal interpolation potentially include political subdivisions?

David Bliss: I think it should. It is not clear when it says persons. In my view one could clarify that by putting in the word political subdivision or person and that would clarify this issue and avoid litigation on it.

Rep. Koppelman: Do we mean individual here and we usually use the word individual if that is what we mean. We just use the word to mean entity.

David Bliss: I would put in every possible adjective so there would be no doubt of the meaning.

Rep. Klemin: Page 1 lines 18 & 19 seem to be the main issue. So I understand you correctly if this was amended to say is not liable for any claim based on a naturally occurring hazard regarding that congressional section line unless the political subdivision had actual knowledge of an unusually dangerous or unusually hazardous condition and failed to warn travelers of that condition.

David Bliss: That is my person view. I don't think a notice requirement is unreasonable for either man made or naturally occurring. But I think the liability has to flow with both of those situations and not just one.

Rep. Klemin: They would still be immune from liability unless they had knowledge of the rest of what I said.

David Bliss: I think that is what the case might be heading toward is to say that notice requirement isn't unreasonable and I think that would hold up for both naturally occurring and manmade. I think it would just attach specific requirements that have to be made. In some sense it does limit it more because now all of a sudden you have a notice requirement but if one removes the written notification for the reasons we talked about a ten day notice requirement may not be amorous.

Rep. Hatelstad: Since I live in western ND and you could come to the end of a section line and it could be a whale of a drop; isn't there some personal responsibility knowing where you are at; that you are coming down an unimproved section line shouldn't you have some responsibility to be extra cautious?

David Bliss: I think there is personal responsibility that one has to take. In fact in our case that was a part of the defenses argument. The insurance companies argument was that well he was driving too fast; that he wasn't being careful, he didn't use the road and all of those defenses are still available. In our case this was a good A student who was driving with all his protection and going at a reasonable rate of speed; but you can't see the trench. Those arguments were open for the defense to be able to use at that time. We have to keep in mind section lines are congressionally mandated and they are open for public travel.

Jasmine Smith, Sister of Brason Kappenman: (See testimony #6).

Alfred Kappenman: (See testimony #7). We have a lot of Minnesota kids coming out here hunting at the age of Brason and I don't want to see this happen to another kid. I don't want to see this happen to another family. The township is actually a land owner with that section line. They pay liability insurance through Endure every year. My father in law still serves and has served on the township board for over 50 years. He said this is ridiculous; these townships have to be responsible for the section lines. My father in law would call up land owners who dield to dig drenches in section lines and he called them and got them to clean it up right now. If you are going to say I am not responsible for the natural but I am responsible enough to make the farmer responsible for something; are you responsible or are you not? I realize there are cliff and rocks, but you get into our area these section lines were actually roads at one time. They have culverts in them and some ditching to them. About a year after Brason's accident there is a section line about a half mile down the county road from my place and then there are two miles of section line. Toward the end of that section line was an old bridge that people drove across and farmers took their machinery across. They realized it was unsafe; they took the bridge out and put in new culverts in; built it all back the way it should be and they are traveling it again. How can you say they aren't responsible? If they are not responsible then why did they go and replace this bridge. After my son was killed before I even took legal action, I asked all three of my board members, you knew about this hazard. They all three said yes they did. My neighbor said he had heard about it but didn't go look at it. The one that got the phone calls about it took FEMA out there in the spring before the accident and it was rising that day and they came down the gravel road and then what goes into the dirt road and they couldn't get to that spot. FEMA was going to provide money to fix it. So if they are getting FEMA money to fix this isn't this the responsibility of a township? All I want the townships to do is be responsible. It will take forever to drive all these section lines. A township is not very big. It would only take half a day. Maybe it would cost \$100 for gas, flags and posts to mark these hazards. How do you put that up against my son's life? I can't believe a township is not going to be responsible even for a natural hazard. For the record the section line was mowed and you could not see the trench. I could only see the one back tire of my son's 4-wheeler; I couldn't even see the front end of the 4-wheeler and it was lying on its side.

Rep. Zaiser: What about the property owner on the adjacent sides of the section line. I was thinking of the ditching he did to drain property across. Where does he stand in this thing? How do you feel about his responsibilities?

Alfred Kappenman: That is the other issue that I have with this bill. They keep saying well if it is manmade they are going to make this person pay for it or whatever. In this case we couldn't prove that he did it. We know he did it but we couldn't prove it and the reason we couldn't prove it is we don't have pictures. The lawyer kept saying do you have pictures or evidence of tire tracks out there. Did somebody see him? Toward the end of the trail we found there was a person that actually knew he did it but he would not step forward and testify. You have to have the proof that the land owner did it.

Hearing closed.

Chairman Johnson: I see a possibility of three different things to do; we could just pass the bill as is with no changes, we could defeat the bill, or we can decide to work on it.

Some of the issues that we need to look at is on line 18 and 19 the liability from natural occurring hazards. Do we want to say they should make some kind of a warning in front of it or give the township or county immunity from that natural hazard? That is kind of the policy issue if we decide to work with the bill.

Rep. Kilichowski: I think if we take this bill and include the natural disasters we are right back to what state law is now. That they are liable for that.

Rep. Zaiser: I think we should look at making some amendments. They need to be responsible for their behavior of the townships.

Rep. Heilman: I think we should work on it also so we can still do not pass if we don't want to. Do we know what the vote was in the Senate?

Rep. Koppelman: I think we should probably work on it. I don't feel comfortable voting for the bill as is and I am not sure we would do it justice just be defeating it either. I think we need to look at it.


Chairman Johnson: Subcommittee formed: Rep. Klemin: Chairman, Rep. Koppelman and Rep. Zaiser.

2011 HOUSE STANDING COMMITTEE MINUTES

House Political Subdivisions Committee
Prairie Room, State Capitol

SB 2161
March 31, 2011
Job # 16225

Conference Committee

Committee Clerk Signature 

Minutes:

Proposed amendment #1

Chairman Johnson: reopened the discussion on SB 2161. This bill is the one the dealt with obstructions on right of ways. We put it in a subcommittee and I would turn it over to the subcommittee chairman Klemin.

Rep. Klemin: Before I addressed the amendments I just want to give you a little background as to where we were on this bill. This deal with section line roads and under North Dakota law the congressional section lines are considered public roads open for public travel to the width of 36 ft. on each side of the section lines so there is 66 ft. public excess along all of the section lines. In a 1974 case the ND Supreme Court provided a little historical background on that. They said in that case it was well established that the United States in 1866 by the passage of Section 24-77 of the revised statute made an offer of section line easements on public land and the offer was accepted by the Territory of Dakota when it adopted Chapter 33, laws of Dakota Territory. In 1871 legislation said that hereafter all section lines in this territory shall be and are hereby declared public highways as far as practicable provided that they shall not interfere with existing highways and shall not apply to a certain portion of Pembina County. In North Dakota the rights of the public to section line highways and the 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. So that is why we have these section line roads which are call congressional section lines. The bill that we have came to us because of a decision that the Supreme Court made in 2009 in the Kappenman vs. Klipfel township case. We did hear from some of the Kappenman members concerning that case. In that case the Supreme Court held that the township board with actual knowledge of the unusually dangerous or unusually hazardous condition on an unimproved section line road has a duty to warn travelers of that condition. The Supreme Court also said the township has no duty to maintain a road on a section line that a township does not have a duty to inspect every unimproved and invocated section line for possible manmade or natural obstruction. SB 2161 essentially reverses the Supreme Court decision. The main issue was on page 1, lines 18 & 19 that the political subdivision is not liable for any claim based on a naturally occurring hazard regarding that congressional section line. So there would be an absolute immunity for a natural hazard. With that kind of background the subcommittee addressed the issue and we made a number of changes. With regard to that main issue on the naturally occurring hazard the consensus of the subcommittee was that we didn't want to completely reverse the Supreme Court decision on that issue. When we

go through these amendments we are in other places also putting into the law some of the other decisions that the Supreme Court made in regard to manmade obstructions and the duty of the owner who contributes to the condition. To make it easier to read we attached to it the way the bill would look with the amendments in it. (See proposed amendment #1). Went over the amendment and explained it. It is limited due to the natural surrounding topography or geological environment because we have places in this state where the topography, like the badlands. There are section lines there too, and we know in the badlands the way the terrain it is probably all hazardous to travel on so it is very unlikely something would be unusually hazardous given the surround geological environment that is there already. Recounted the Kappenman case. They would only have a duty to warn if they actually knew that it was there and did not warn travelers about it. That is the intent of that part of the amendment. The second part of the bill deals with manmade hazards and in here what we have done is put in some language regarding the knowledge. The political subdivision is not liable for a claim based on a manmade hazard on that congressional section line unless the political subdivision is served with notice of the hazard by certified mail or otherwise has actual knowledge that the hazard exists. The original bill just provided that the political subdivision is notified in writing which creates a question of fact as were they notified in writing and when was that noticed given etc. We thought it would be better if we actually put in a way that they are suppose to receive notice that their served with notice of the hazard by certified mail or otherwise has knowledge because they may know about it without getting served with certified by certified mail. The second part deals with what they are suppose to do in the event that would affect their liability. The 10 day provision is already in the bill.

Motion made to move the amendment by Rep. Klemin: Seconded by Rep. Maragos:

Discussion:

Rep. Shirley Meyer: What is the difference between personal and actual knowledge? On the first page where you have changed the each overseer of highways having personal knowledge to actual knowledge.

Rep. Klemin: We did not make that change; that is the change in the original bill as we received from the Senate, but I would agree with that change because if you look at the original bill on page 1, line 8 personal knowledge is not a term that is actually defined in North Dakota Century Code, but actual knowledge is defined so I am assuming that is why they changed it.

Chairman Johnson: On the second page of the engrossed version; a it says the subdivision is served with notice of the hazard by certified mail and I understand you wanted to prevent somebody saying will I sent you a note or something, but then it goes to the actual knowledge that the hazard exists or otherwise; so are we back to the he said she said kind of thing again?

Rep. Klemin: It is not necessarily that way but this would be a matter of proof. The best method would be to be for someone to serve the political subdivision with notice by certified mail. That is not going to be required if they had actual knowledge that the hazard exists even without somebody serving notice. It would then be a matter of proof and courts are

used to dealing with those kinds of factual situations all the time. Did the person have actual knowledge that the hazard existed or not and there would have to be something that supported that assertion and if it is simply a matter of he said versus she said that is going to be up to the jury to decide who to believe just like it is with almost every case.

Rep. Heilman: The question of certified mail comes to mind. I don't even know how to do certified mail. That is not just a postage stamp on an envelope? This would not be certified mail; is that correct? Why does it have to be certified mail?

Rep. Klemin: Certified mail is commonly used to serve all kind of documents; even a lawsuit that way. We have rules on how certified mail is done and pay an extra fee and there is a receipt signed by the receiving person.

Rep. Kretschmar: If Rep. Heilman sent a first class letter and he could show they got it then I think it would come under this; otherwise actual knowledge of the hazard is a matter of proof.

Chairman Johnson: As I have thought about this bill. The Senate bill as it came to use gave some immunity to political subdivisions. The amendments put a little bit more liability and definition so that is the call you have to make on this one.

Voice vote carried.

Do Pass As Amended motion made by Rep. Klemin: Seconded by Rep. Maragos:

Roll Call Vote: 11 Yes 2 No 1 Absent Carrier: Rep. Klemin:

March 31, 2011

VK
3/31/11

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2161

Page 1, line 11, remove "or"

Page 1, line 12, remove "unmaintained"

Page 1, line 18, replace "regarding" with "on"

Page 1, line 19, after "line" insert ", unless the political subdivision 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 and failed to warn travelers of that condition"

Page 1, line 20, replace "regarding" with "on"

Page 1, line 22, replace "notified in writing" with "served with notice of the hazard by certified mail or otherwise has actual knowledge"

Page 2, line 2, after "hazard" insert "or fails to provide warning that the congressional section line has a hazardous condition"

Page 2, line 2, after "after" insert "service of"

Page 2, line 3, replace "written notification." with "notice"

Page 2, line 3, remove "fails to provide warning that the congressional"

Page 2, line 4, replace "section line has a hazardous condition" with "after the political subdivision has actual knowledge"

Page 2, line 5, replace "creates" with "causes or contributes to"

Page 2, line 6, replace "by altering" with "on"

Page 2, line 6, replace "is" with "may be"

Page 2, line 6, remove "any"

Page 2, line 6, remove "caused"

Page 2, line 7, remove "by the alteration"

Page 2, line 8, replace "seek" with "issue"

Page 2, line 8, replace "alters" with "causes or contributes to a hazard on"

Page 2, line 9, remove "restore the congressional section line to its original"

Page 2, line 10, replace "state" with "mitigate the hazard"

Re-number accordingly

Date: 3/31/11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2161

House 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 Rep. Klemin Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson			Rep. Kilichowski		
Vice Chairman Hatestad			Rep. Shirley Meyer		
Rep. Beadle			Rep. Mock		
Rep. Devlin			Rep. Zaiser		
Rep. Heilman					
Rep. Klemin					
Rep. Koppelman					
Rep. Kretschmar					
Rep. Maragos					
Rep. Pietsch					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*Vote
Carried*

Date: 3/31/11
 Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
 BILL/RESOLUTION NO. 2161

House 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 Rep. Klemin Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman Nancy Johnson		✓	Rep. Kilichowski		✓
Vice Chairman Hatelstad	✓		Rep. Shirley Meyer	✓	
Rep. Beadle	✓		Rep. Mock		
Rep. Devlin	✓		Rep. Zaiser	✓	
Rep. Heilman	✓				
Rep. Klemin	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Pietsch	✓				

Total (Yes) 11 No 2

Absent 1

Floor Assignment Rep. Klemin

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

REPORT OF STANDING COMMITTEE

SB 2161, as engrossed: Political Subdivisions Committee (Rep. N. Johnson, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2161 was placed on the Sixth order on the calendar.

Page 1, line 11, remove "or"

Page 1, line 12, remove "unmaintained"

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Page 1, line 20, replace "regarding" with "on"

Page 1, line 22, replace "notified in writing" with "served with notice of the hazard by certified mail or otherwise has actual knowledge"

Page 2, line 2, after "hazard" insert "or fails to provide warning that the congressional section line has a hazardous condition"

Page 2, line 2, after "after" insert "service of"

Page 2, line 3, replace "written notification," with "notice"

Page 2, line 3, remove "fails to provide warning that the congressional"

Page 2, line 4, replace "section line has a hazardous condition" with "after the political subdivision has actual knowledge"

Page 2, line 5, replace "creates" with "causes or contributes to"

Page 2, line 6, replace "by altering" with "on"

Page 2, line 6, replace "is" with "may be"

Page 2, line 6, remove "any"

Page 2, line 6, remove "caused"

Page 2, line 7, remove "by the alteration"

Page 2, line 8, replace "seek" with "issue"

Page 2, line 8, replace "alters" with "causes or contributes to a hazard on"

Page 2, line 9, remove "restore the congressional section line to its original"

Page 2, line 10, replace "state" with "mitigate the hazard"

Renumber accordingly

2011 SENATE POLITICAL SUBDIVISIONS

CONFERENCE COMMITTEE

SB 2161

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee Red River Room, State Capitol

SB 2161
April 13, 2011
16509

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to political subdivision liability; and to amend and reenact section 24-06-31 of the North Dakota Century Code, relating to obstructions in highways.

Minutes:

You may make reference to "attached testimony."

Chairman Olafson opened the conference committee on SB 2161. Senators Olafson, Andrist, Dotzenrod and Representatives Koppleman, Kretchmar, Kilichowski. All the conferees are present.

Chairman Olafson: 0200 Senate Version; 0300 House Version. Does everyone have two pages of both 0200 and 0300?

Representative Koppleman: House essentially looked very carefully at the bill and looked at the bill and it's obviously a complex issue. We appointed a subcommittee to study it and came up with the changes before you. I will quote from Representative Klemin's handout to the committee, 'Referencing the Kappenman's decision of course we heard testimony on that decision in the bill hearing. He points out that the bill was introduced to reverse that decision of the Supreme Court and as it was explained to us some of the reasoning that the Supreme Court used to reach its decision was different from what has been the standard in the past. So we understood the need for the bill. Then he points out that the goal of the bill is to save legal expenses for the North Dakota Insurance Reserve Fund which insures townships and other political subdivisions. I don't think the House is necessarily opposed to that either. I think the question is what's the fix here? I am sure you grappled with on the Senate side as we dug deeper into this the more we looked it the more complex it became. One of the issues is we have this issue of congressional section lines which is a term implies a congressionally mandated entity and we also have greatly varying topography in our state and the duty of townships rather and other political subdivisions. Representative Klemin who actually chaired the subcommittee in the House and also carried the bill on the floor noted the disposition of the case by the Supreme Court turned on whether they 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 there was any actionable negligence. And so that was an area we really dug into. First of all 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 exercises ordinary care and driving within the limits

of the law could not drive on that part of the road safely. Later, Representative Klemin in his little brief that he prepared for the committee notes that the House amendments to SB 2161 with respect to a naturally occurring hazard is an effort to further define what an unusual hazardous condition is. In a view of the House the reference must be made to the surrounding topography and geological environment and the same condition in one part of the state may be unusually hazardous but might not be somewhere else. He also notes that the House amendments clarify the potential liability of political subdivisions for claims based on naturally occurring hazards and provide limited immunity rather than absolute immunity. I think that's one of the key questions that we need to discuss between us. The amendment provides in Section 1 that doesn't apply to unimproved section line roads but they are covered in Section 2. Section 2 gets back to the congressional section lines which were created by Congress back in the public land and Dakota Territory days 1866. In section 2 the bill clarifies the extent of the potential liability of political subdivisions and the adjacent land owners for hazards in unimproved section line roads. It doesn't cover section line roads that have been improved or are being maintained as road. The potential liability of political subdivisions for hazards on unimproved section line roads is limited and depends on whether the hazard is natural or man-made. 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: 1) the political subdivision must have actual knowledge of an unusual 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 2) when a political subdivision that has that actual knowledge of that kind of condition they are not liable unless the political subdivision failed to warn travelers of that condition. That section only applies when the hazard is so peculiarly dangerous given the surrounding area that there is substantial risk that a person exercising due care could not travel safely on that part of the section line road. They don't have a duty that points out to do roving inspections of those roads or anything else. It has to do with actual knowledge and notice and under subsection A-2 if the hazard is manmade the political subdivision is not liable unless it is served with notice of the man made hazard by certified mail or otherwise has actual knowledge 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. That basically outlines the changes that were made.

Chairman Olafson: Well I think it would be good for us to start with where the bill began; version 100 which I have in front of me. It began as a bill which would've provided complete and absolute immunity from liability on unimproved section lines. When it came to the Senate we looked at it and thought that it was over reaching and did need to be amended. We came up with what we felt were reasonable amendments which provided a balance between individual responsibility on the shoulders on those who should chose to travel on those unimproved section lines; and the responsibilities of the elected officials who know of a man made hazard and chose to do nothing to mitigate the hazard and provide warning that the hazard exists. We felt there was a lot of merit to having a balance between individual responsibility and the responsibility of elected officials. So that is why we amended the bill to be passed by the Senate in the form you see in 02000. He is the problem that I see with the House version 03000 and that is one page 1, beginning on line 18, where the language 'unless the political subdivision had actual knowledge of a 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'. In my opinion, that language is either an attorney's nightmare or an attorney's dream depending on which side of the issue you're on. I don't know, and I am not an attorney but I don't know how you would reasonably interpret that. I don't know how a township officer or county commissioner would reasonably interpret that. I think it opens up a lot of room for interpretation in so many different ways that I don't know how you would reasonably interpret that language. I also don't feel it is reasonable to require elected officials to warn of a hazard that Mother Nature put there for thousands of years. People have to have some individual responsibility when they travel on an unimproved section line. I just think that's not reasonable to require political subdivisions to provide warnings of natural hazards, in my personal opinion. Here is my fear. If you put this language into the code, I think township officers and county commissioners would be scared to death of this. To cover themselves I think they would err on the side of putting up warnings for every type of hazard out there and my concern would be that we would have signs and red flags and t-posts all over the Badlands, the area around Lake Sacajawea, the Turtle Mountains, Pembina Gorge, Pembina Escarpment, and the area around Devils Lake. Is that really what we want to do? and the area around Devils Lake. Is that really what we want to do? I don't think so. Do we want township officers so scared of this that they won't run for a township board if we have to deal with this. I think it's reasonable to expect that people should have some individual responsibility for their own action. I think what we came up with is a reasonable compromise between individual responsibility and the responsibility of elected officials.

Senator Andrist: My big concern is this started out as bill to provide immunity. To me Subsection 1 and section 2 turns it totally and states they do have liability. This not only would make township officers feel threatened to comply with the law for the township, but it would make them feel personally threatened by it because if he had knowledge of huge rock on a township line that had no road, now all of a sudden they are saddled with a responsibility. There will be a whole lot of signage going up all over but we have so many township lines out in our area that aren't even prairie trails. You wouldn't know they are section lines if you didn't unless you took your bearings and figured it out by visual surveying. Some of them go across open fields and pastures and there is not a sign of a trail on them. What we locked into that these are not really roads that we're concerned with. If there roads, well they certainly have liability for obstructions on them but, unimproved section lines.

Representative Koppleman: I appreciate what the Senate is attempting to do and trust that you will appreciate what the House is attempting to do also. I really don't think we are that far apart philosophically. I think the key is trying to come to language that works. In my view, and looking at the broader picture what's happened here is that the Supreme Court case created liability. The bill was introduced to provide immunity and both what the Senate did and what the House's done is somewhere between those too I think. The question is do we want to completely say that what the Supreme Court said was wrong and that there is no liability or do we want to say that there is complete immunity and I don't think either one of us necessarily on that page but where is the middle ground? So on this point of reference to unimproved section lines, what the House grappled with there and I totally understand what you're saying about area of our state that are rugged and these section lines are artificial things that Congress has told us we have to have and in some

parts of the state they are fairly obvious where they are or ought to be, and then in other parts of the state, not at all. But I think what happens is and what we struggled with was a case or circumstance like the Kappenman case, but nevertheless that is what prompted both the Supreme Court case and the bill before us. That as we heard the testimony and read the Supreme Court case was a situation where a young man was driving along an unimproved section line which was on their property or adjacent nearby and everybody kind of knew that area and for all appearances it was a grassy area and he was driving a four wheeler, and it should've been something that was passable. And it wasn't just driving through a field or pasture it was a section line. All of sudden was this cutout and he ended up dying as a result of that. Now that's tragic and we all agree with that, so then the question is okay, what is the townships responsibility if any? What we tried to balance we tried to strike on that in the House I think is to say if the township had no awareness of that, they shouldn't be liable. If it was an area that Senator Andrist described where based on the topography and the landscape you have no reason to believe that it's a safe place to drive the township shouldn't be liable. But if it's a situation where something, whether naturally occurring or man-made, it couldn't be determined in the case that it was man-made, but there is suspicion that it was, but let's say it is naturally occurring, a washout after a spring flood, and someone called the township officers and said you know the section line over here has always had a high embankment that people had driven on with motorcycles and 4 wheelers and pickups for years and now there's a big washout and that's dangerous. If the township did nothing about it, should there be any liability that is the question?

Chairman Olafson: I would point out that and again I agree we're not trying that case, but I would point out that a case similar to that with those circumstances and there was an assertion that this was man-made or at least prompted by mans activity and accentuated by nature. The problem as I understand it, they weren't able to prove that but the assertion was there and so for the sake of argument here let's assume that could've been proven and perhaps should have been admitted. In that hypothetical case, the amendments that we adopted in the Senate would have left in place liability for the township. It was a man-made hazard, the township officials knew about the hazard and chose to do nothing about that. The way the Senate amended the bill, the township would have been liable.

Representative Koppleman: I am not sure if, and I don't dispute any of the facts that you talked about but from a legal perspective I am not sure that is true because I think it was not established in court that it was man-made. I agree with what you said. Should have been maybe, but the fact is it went all the way to the Supreme Court and that case was not made because had it been as I understood the case, then the landowner would've had some liability. The reason the landowner wasn't held liable because it couldn't be proven that it was man-made. So if that same set of circumstances occur and that same lack of provability was there then I don't think the Senate's version of the bill would do anything and that's why we grappled with this and tried to say okay, if there is a hazard that is either natural or at least can't be proven to be man-made and if people have clearly come to a political subdivision and said hey this is a hazard and dangerous you've got to warn people, its unexpected, it is not what you would reasonably expect to come across out driving out there in that part of the country side and the township is arguably in this case, did nothing. Then the question is should there be, and I think frankly, if the Kappenman case were tried today, with the Senate version, there would have been no liability for anyone because the

township would not have been liable because it could not be proven to be man-made they would have no liability and if it could not be proven that it was man-made the landowner would have no liability either. So on what arguably is a natural occurring hazard or one you can't prove is anything else, only the House version of the bill would have any recourse for somebody in that kind of circumstance.

Senator Andrist: I suggest that we aren't all retrying the Kappenman case. My sense is the Senate version the whole decision would've centered on whether it had been altered by man. If it had not been altered by man I think the township should have had immunity from liability even if it was washout. When you travel on these section lines you have to assume some responsibility because they aren't roads. A road is a road, but a township line is passable but that's my view. I think we all look at this from where we come from ourselves and the reality where we live. People who live in cities I realize probably are not section lines, they don't have roads. The language change is particularly objectionable to me is in Subsection A. For a man made hazard, you have the word, has actual knowledge that a hazard exists. Our language said that they have to be notified. Committee members you see if you see you say it has actual knowledge then you leave something open for the lawyers to fight about. My concern is lets either give them immunity or let's not. Let's not impose new liability on them, they don't already clearly have.

Representative Koppleman: First of all, I think maybe the House would disagree a bit with the premise that there should be no liability if their notified. I don't think any of us disagree that if they have no knowledge of something and whether notification is in writing or whether it actually, but I think the question is if they know, should there be some responsibility? That's one question I would like our committee to think about. The other issue is getting back to some of what the House was crafted with in regards to the landscape, because we didn't want an orange jug hanging every mile out in the Badlands. We want to avoid that too and that's why we said about naturally occurring topography. The peculiarly dangerous language comes out the Supreme Court decision and that's where that originated.

Conference committee on SB 2161 is closed.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
April 14, 2011
16601

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Conference Committee meeting on SB 2161 relating to political subdivision liability and to amend and reenact section 24-06-31 of the North Dakota Century Code relating to obstructions in highways.

Minutes:

You may make reference to "attached testimony."

Chairman Olafson opened the conference committee meeting on SB 2161. Senators Andrist, Olafson, Dotzenrod, Representatives Koppelman, Kretschmar, Kilichowski were present and accounted for.

Chairman Olafson: Unless some of the committee members have something new to bring forward at this time I do have an amendment prepared for your consideration.

Representative Koppelman: We can certainly look at that, but I felt like I kind of unintentionally dominated our discussion last time. I wanted to see if any of our conferees would like to add anything before we look at the amendment.

Representative Kretschmar: I certainly agree with the House amendments. Rep. Klemin worked on the subcommittee I believe and he wanted to get some of the language that the Supreme Court used in a couple of those cases into the bill which he did. I think basically the House amendments are a pretty good thing, but maybe the Senate doesn't agree with that anyway.

Chairman Olafson: Well if the Senate agreed with that perspective we wouldn't be sitting around this table. Just for the record, I think at least a couple of us on the Senate and I think that is the mood of many members of the Senate that we are really hung up on that natural hazard. What we fear and what we want to avoid is the possibility that we are going to put township officers and counties into positions where they feel that in order to protect themselves they have to cover the countryside in signs and red flags. I also fear that we will have elected officials who will be reluctant to serve in office if we start getting into that type of position. So that is our concern.

Representative Koppelman: I think we share that concern frankly. That is a discussion we had both in the subcommittee and in the committee in the House side because we wanted to make sure that we didn't have the countryside littered with red flags and signs as you indicated. We were trying to take that into consideration the diverse landscape of our state when we tried to craft the language about topography and all that. I am not saying it was

perfect language but it was our intent. It was our attempt to deal with that and use some common sense to say if you're into the Badlands and their cliffs and bluffs and ravines obviously it's not a normal passable kind of thing or area and people should recognize that. On the other hand if you're in flat land and it's smooth and people have been driving there for 30 years and all of a sudden there's a piece cut out of it, and that is a different animal. We're trying to get our arms around that, not easy to do I understand, but certainly would like to look at what you've got.

Chairman Olafson: he presented an amendment, it does move the bill back closer to what the Senate would like to see. To read it in context if you start in the middle of the page Section 2 as intended to read as follows and what it will do is Section A subsection 1 it takes out the naturally occurring hazard, takes that off the table. It does maintain the House language which requires service by certified mail and I think that is a good thing. I think it avoids the he said/she said or were they notified, weren't they notified; I like the idea of the certified mail notice and I believe other members of the Senate conference committee and members of the Senate in general would be supportive of that. It does maintain in Subsection B, that there is liability on the shoulders of a person who creates the hazard. I think that is important and we are in agreement with that. But that is something that needs to be added in that we haven't had before. Subsection C that may issue an order, I think we are all in an agreement but that is a good provision as well. So basically what this does, it keeps some of the House provisions in but takes the natural hazards off the table.

Rep. Koppelman: We did get an email from an individual who was involved in the case that we all heard about. What struck me, one of them was that he would just assume the bill go away. Because he believes and I think legal scholars that look at this would conclude, that what the Supreme Court has done is create liability with that case. So I think the reason the bill is before us is to try to adjust that. Our only debate is how do you do it? How do you do it right and fairly? I would like to say at the outset that I think coming to an agreement and getting a bill passed is very important for all of us. I look at what your proposing Chairman Olafson and I understand and it is a lot closer to what the Senate passed as you indicated. I think some of the concerns the House had would remain with the amendment. I don't know I would be prepared to support the amendment in its current form. However, one of the things that I think we might be able to talk about at least in my mind, is if we were to have something in there about these naturally occurring hazards and let me preface it by saying this. I recognize how this affects the insurance reserve fund, how it affects local public officials, be they township officers or county commissioners and so on, and how it affects the liability landscape in the state. We represent all those people to a degree. But to a greater degree we represent the citizens that elected us and so I think the balance we as legislators need to strike is finding a way to keep all those interests and views and points in mind. When I think about it from that perspective, and I look at a possibility of a natural hazard, again recognizing that they can occur everywhere. That's why we have the language in there that says it sort of a legislative way of saying use some common sense folks. If we can find a way to put language like that in that would maybe be different than from the House, but something that would tell people, hey use some common sense here. On the other hand what I think to totally exclude natural hazards, my only concern about that is that if there is some natural hazard that is presenting a huge problem and isn't a naturally occurring topography kind of issue and maybe it's new, changed, maybe people have driven down that section line or used it to get to their farm field for years, have never had

the problem before because it wasn't there before, but all of a sudden as a result of washout or flood there is this hazard and the people that know about it notify the township and we can talk about what the notification is either certified letter or whatever. I know the actual knowledge does create some muddiness and I understand that. But if they have clear notice and then they fail to do one of two things, mitigate and maybe they say we can't mitigate this is a natural hazard and it would cost us hundreds of thousands of dollars to fix it and we can't physically fix it fine, put a sign up and say hazard ahead, do not pass. I personally would like to see something like that as a safety valve in a fair compromise.

Senator Andrist: What I am thinking is to me a natural occurring hazard is something that has probably been there for from the beginning of time. Even a washout would if it stood there for 200 years would have to have a man made genesis, something changed you know. So, that is why I've preferred to eliminate the natural hazard thing because the only thing we would leave in contention is if some act of man had caused this hazard. That is why my position would prefer to take that out.

Representative Kretschmar: You know your proposed amendment I think is pretty nearly okay. I kind of like that. And that would just replace section 2 of the bill, as the bill is now? Is that the idea? **Chairman Olafson:** The current version that we should be looking at then version 0300 as it came from the House. Is the committee in agreement with that is the version we are working off of? All agreed. So yes the proposed amendments in context there it would correct version 03000. **Rep. Kretschmar:** you see Mr. Chairman we still in our law and in when we get into court litigation the defense or legal principal of assumption of risk is still in our law. So, if someone is injured in some context like this, the defense can still try to show that person assumed some of the risk or did something that he or she shouldn't have done. Then of course now when we have comparative negligence the try or fact either the court or the jury determines what the percent of negligence is on either of the parties. And if you get up to 51% you will get nothing. So it depends of course on the facts and the arguments in each individual case. But you know I kind of agree too with Rep. Koppelman that maybe there should be a little something in the bill to warn people. But, right now I don't know what that language would be.

Rep. Koppelman: I didn't pay a lot of attention to the portion of your amendment that deals with man- made hazards. I probably would not have objection to that either. But, it's the 7 A-1 here the item that completely removes liability for any claim based on a natural occurring hazard that I was addressing earlier. I appreciate Rep. Kretschmar's comments.

Rep. Kilichowski: I agree that there should be something in here concerning the natural occurring hazard. Is it possible to put an effective date in there so that anything prior too ? **Chairman Olafson:** Probably not. Well if it is the sense of the committee that we want to keep natural hazards on the table, then I have another amendment.

Chairman Olafson: If you refer to the back page of that where it says Section 2 is then intended to read as follows. It doesn't specify whether its natural hazard or man-made hazard. It simply says it's not liable for any claim based on a condition on that congressional section line unless the political subdivision is served with notice of the condition by certified mail and the condition is unusually hazardous or unusual dangerous which is the language which the House was referring to which came out of the Supreme

Court case. I like this language better than what we have had previously. The political subdivision either fails to take action to mitigate the condition or fails to order mitigation of the condition or fails to provide warning that the congressional section line has a hazardous condition as soon as practical but not to exceed 10 days after service of the notice. In Sections B and C, it maintains the language that we previous discussed the liability on the individual and that the political subdivision may issue an order. What this does it really doesn't matter whether it's a manmade or a natural hazard but the service, the political subdivision must be served with notice by certified mail. In my mind yes there is a pile of natural hazards out there but somebody has to be concerned about it and notify the political subdivisions of the existence of that hazard. This is an option for us to consider. This would seem to me to be a reasonable compromise between the House and Senate positions on the bill.

Senator Andrist: I still don't like the idea of qualifying natural hazards, but it's the practical side of me plus my desire to compromise. I suggest that in my frame of reference at least, if somebody has gone to the trouble of issuing a letting by certified mail, certainly the township board should take care of it whether it's natural or man-made. So the practical effect I think is going to be accomplish what we wanted to, so **I will move the amendment** just to get something on the table.

Representative Koppelman: Which amendment, the second one. **Motion and a 2nd.**

Further Discussion:

Representative Koppelman: What you're suggesting in the amendment is that there be no distinction between man-made and natural occurring hazards. I guess that's fine because if we concede that certified mail is the notice that we want in any case, because as I look at the House bill it seems to me that one of the major differences is that we have certified mail or actual knowledge in both of them or do we? **Senator Olafson:** No, this amendment does not include actual knowledge. **Representative Koppelman:** The original House bill is what you're saying. **Senator Olafson:** Correct. **Representative Koppelman:** What I am looking at is does it have it for both the natural occurring and the man-made. Yes. **Senator Olafson:** It did. **Representative Koppelman:** It had actual knowledge in the natural occurring and it had certified mail in the man-made. I think that is what we had in the House. This would change that to certified mail. I personally don't have a problem with that. The one question I do have about the way the amendment is crafted is that I noticed it takes out the language which kind of defines what an unusually hazardous or unusually dangerous condition. The amendment has no description of what that is and the bill does or the House version of the bill does. As I read that I think the reason we included that is that we didn't want it to be subject to a lot of interpretation and litigation to determine so we tried to actually narrow it by saying unusually dangerous means this; and it's not a definition in the definition section but it's kind of an explanation. Now that explanation came out of I believe the Supreme court case, so I suppose you could argue that whether we through the amendment or whether we have it crafted it the way the House did in court the same kind of definition might prevail because in a court case they probably say well here in the law its say unusually dangerous, unusually hazardous and here is what the Supreme Court in this case said that means. So it would be kind of a linkage and it would maybe come to the

same conclusion. What was the thinking in taking that out? Is it wise for us to try to define it to narrow it?

Chairman Olafson: Well in response to that, I saw the House definition as being problematic. I think in either case whichever one of these we adopt I think if we get to cute with the definition and define with too much language, that just muddies the water where in either case a court is going to have to decide was that unusually hazardous or unusually dangerous. I think you're going to have that no matter what, so to me the simpler the language is the better. The court is going to have to interpret that in either case. So let's not create a bunch of complex language and try to tell the court how to define it.

Representative Koppelman: Comment/question? The language here and the House bill came from the Supreme Court decision. I am not married to that language however, and I am just wondering if we couldn't craft language that would actually limit liability for the townships further if that is our intent by saying something like, we say an unusually dangerous or unusually hazardous condition is something so extreme, extreme that no reasonable person would expect. Something like that I think would narrow that a little bit so that as you point out, otherwise if all you say is unusually hazardous dangerous, there is all kinds of litigation about what that means. I think we could forestall some of that by trying to tighten it a bit.

Senator Olafson: Well, committee members I would certainly be willing to work with some folks to see if we can come up with something for the committee to consider in that regard. I think if we can come up with a better definition of that subsection B than I certainly would be willing to consider that. Let's prepare something for the next meeting.

Senator Dotzenrod: If you look the House bill 03000, when you get into Section 7, sub 1&2, Sub 1 refers to naturally occurring hazard; Sub 2 man-made. So you have both natural and man-made in those areas. In both cases they use the term actual knowledge of the hazard. There isn't a requirement there for certified mail or regular mail, but, just actual knowledge and the thing I am wondering about is if you could establish in a case where there was an injury, that the governing board township officers had actual knowledge and that could be established that they knew of this and they didn't do something, it seems to me that there is a reason to expect that the court I would think or someone trying to adjudicate this would look and say well if they did have actual knowledge, that there would be a burden on them. The court or whoever is adjudicating would look at it and they may not have gotten a certified letter, but if we can establish clearly they had actual knowledge it seems to me there would be by someone, an imposition of responsibility at that point. I am not sure of what that responsibility would be particularly, but it seems that too warn the public or to mitigate it or do something. I am having a little trouble with the idea that we're just going to use written notification only when there may be a case where it's going to be pretty clear and they knew about it. I would think that at that point there would be the law or judges but that is the issue I am looking at right now. How can you abdicate that responsibility if it's pretty clear they had actual knowledge? That is my question.

Senator Olafson: In most cases, a Township Board is going to have actual knowledge of the existence of a river coulee, slough, huge cottonwood tree, or a big rock. They are going to have actual knowledge of it. They know their home territory. But does that mean that they then have liability for not warning of its existence. That would be my response to

Senator Dotzenrod's question. They have actual knowledge, that would be easily proven in a court of law but does that mean they have liability for the existence of the river coulee, slough, swamp, tree or rock. That would be my question?

Senator Andrist: My concern is start using actually knowledge. Well we get to he said/she said thing if you get into court. Plus you've got the situation where sure everybody knew there is a big rock but nobody has used it as a road for a long time. It is particularly in the area of natural occurring hazards that I want to make sure that we had the language that there had to be a trigger whether its certified mail or something else. That delivered certified mail is proof that it was delivered.

Senator Dotzenrod: I understand what you're saying there and it does seem to me what you're talking about in response to my concern is that if actual knowledge is the only criteria then you have to start marking and you're going to have flags and barriers up and every natural slough or have a geography of an entire township covered where there is a lot of rough territory all over the place. There is a downside to using that as a trigger. It seems to me there ought to be a way to figuring out where common sense and some responsibility on the user of the road. I guess I don't know how we make that line clear.

Rep. Koppelman: I want to respond on the House's perspective is on that issue from our deliberations. I would encourage us to reschedule. There is a motion to a point of order on the floor. Are we able to carry that over or do we have to withdraw it?

Chairman Olafson: I believe we can carry it over. The motion will remain on the floor.

Senator Andrist: I would like to suggest that this proposed amendment be put into context for us so that we can look at it straight and the our chairman and Rep. Koppelman first look at it before our meeting to be satisfied with the language before it is presented to the rest of us.

Chairman Olafson: It will be in context as it is here on the back page of this second set of amendments that we're looking at and its my understanding committee, that what we are going to do is to try to determine if there is more favorable language for that Subsection B.

Conference Committee adjourned.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
April 18, 2011
16645

Conference Committee

Committee Clerk Signature 

Explanation or reason for introduction of bill/resolution:

Relating to liability of townships

Minutes:

You may make reference to "attached testimony."

Chairman Olafson opened the conference committee on SB 2161 to order. All members are present and accounted for. Committee I passed out an amendment for us to consider. The first page contains in bold print because as it came to me it was in red, so I bolded it for the committee what we're adding into the code that we were looking at yesterday. The rest of the amendment that we looked at yesterday, the 2nd amendment would then remain on changed but we would propose to add to add this language.

Representative Koppelman: I certainly have no objection to the additional language. I do want to revisit just for a moment though so the committee can chat a bit about this a little bit. Senator Dotzenrod raised a question right at the end of our last meeting and we were running out of time. The amendment even as changed contains this language of certified mail and I don't necessarily have a problem with that, but the question that I do have is whether it would be likely in the real world? I think that was what the House dealt with and that's where we came up with 'actual knowledge' and I understand the problems with the term 'actual knowledge' so I am not married to that either. But, what we were trying to get at in phrasing that I think, was this question of what happens if you had a situation like this where there was a hazard either natural or man-made that came up on a section line, the township officers or the county commissioners were clearly present, I mean under the language of the amendment, they could've had 10 phone calls from concerned constituents saying this is an issue you guys need to deal with and yet they wouldn't have the responsibility under the law to deal with it. So, I don't know what the language is that could fix that, but, that's the nagging thing in the back of my mind.

Senator Andrist: I think Representative Koppelman that we have to assume that those township officers are responsible people to begin with. They aren't going to be grossly irresponsible. The reason I like the certified mail, and that was the House language, I like to refer to the wisdom of the House on that, it takes the dispute out of court if you ever do get to court. Due diligence you can debate what that is, but you can't debate what a piece of certified mail is. That is why I like it and I would like to add the motion that I made yesterday, pending this is exact language I intended it to be.

Chairman Olafson: This language that is before you today in the bold print that was taken directly out of the Supreme Court decision, so it should make the Supreme Court happy. I would also add in response to Rep. Koppelman's comments where I would see the certified mail kicking into gear, yes, there's an immediate sudden problem, yes they are going to get 10 phone calls and I would envision that they would act immediately. It would be only when they didn't act to mitigate or repair the situation or to provide warning; that's when someone would say look, we called them and they're not doing a darn thing about this. I am going to send them a certified letter and then they are going to have to do something about it.

Representative Koppelman: Well I think that makes sense, but the question in my mind and it gets back to the issue we talked about of representing and looking out for the interests of the local political subdivisions which I think is the responsibility of the legislature and we pass a lot of laws about that. In the real world I understand what Senator Andrist is saying about court and it makes it clear and clean; but in the real world I am just not sure that 's it's likely to happen or that they would even know that there is this requirement in law. The reason the House put the language in is we had that other provision about actual knowledge and it was kind a two different standards for two different things. What about this as a discussion point or an option? What if we were to say, written notice? That would avoid he/said, she/said in terms of telephone calls or approaching them in a public place, but it would include sending them an email, letter non certified, it certainly would include certified mail too. If a constituent really wanted to make this issue stick they could still do certified mail. I guess your right Senator Andrist when you talk about things that are up for legal discussion or in a courtroom written notice would leave open the question of the sent letter and the recipient said I never got it. But it would at least preserve, email return requested too.

Senator Andrist: This is the language the House offered in its original amendment. I guess I would like to see if you want to stand by your own words before we talk about tweaking this further.

Representative Koppelman: Yes, certified mail was in the House version but that was there because it was one form of communication and the other dealt with actual knowledge. We already said that was to general.

Chairman Olafson: Well lets' go for Plan B. I do have language that we could consider which would be the political subdivision is served with written notice that is either in its possession or verified by receipt, and it would include certified mail (Ex. email).

Representative Kretschmar: You know if we put the position in statute that the notices have to be sent by certified mail that would be it. But, in the context of a real live dispute in court, I am sure other evidence could be admitted as to whether the political subdivision received actual notice about this condition or whatever. I am sure that evidence if it could be produced would be admissible or not in a court case regarding an injury caused on a section line or something like that.

Chairman Olafson: (Example cited); proof of notice to township officer with a return receipt.

Representative Kretschmar: That is absolutely in the court, sure.

Senator Andrist: From a practical standpoint I don't think the language makes that much difference. I guess I am thinking of if this lessens the insurance burden somehow then it has a little bit of practical effect, because it saves money. From your standpoint of liability and insurance coverage, do you see any difference in these two approaches that we are talking about?

Steve Spilde: Yes I do. A simple written notice standard is left open to factual questions about whether or not it was sent or received. In those kind of factual issues would probably get you by summary judgment; summary probably not lie in that type of case. If a standard was certified mail, however, it's self proved basically if the township entity will have or the county if it's in charge of the road, will have the document in hand or the person who sent it by certified mail will have a copy with the receipt. If it's there you go on with the case, if it isn't summary judgment may very well lie on that type of case.

Senator Dotzenrod: Mr. Spilde, this goes back to a whole need to have the bill. Is there really a problem here in terms of a number of cases that are being filed or have we seen more interest in cases or inquiries about lawsuits? I am under the impression that this is a pretty quiet waterfront. I don't think that there is any indication that this is really a problem. Are we seeing an increase in people wanting to sue or that the numbers suites being filed are going up? I remember the days when we had errors in omission policies that were a \$1000 a year, now their down to less for townships. They appear to be getting covered and at a fairly low cost, so I am puzzled by this. We are trying to get this detailed and prescriptive so that we can really narrow this down. In terms of the problem that's out there is there any reason to think that we've got a real issue here? Is liability been expanded because of that lawsuit? What is going on here?

Steve Spilde: Up until 2009, we didn't think that there was a great deal of problem. The status of the law at that time as we read it was announced by the court last prior to 2009 in 1982 in the De Lair versus the County of Lamoure case wherein the courts said that the townships or counties do not have a duty to maintain those types of congressional section lines. So what changed was the decision in 2009 in the Kappenman decision and that did in our view expand the liability possibilities. You're right in estimating the number of claims that we've had on this type of issue up to this point in time, very few. In fact we didn't remember one on in our office prior to 2009. What we don't know though is the status of the law being up to that time there was no duty on the part of the township or counties to maintain those congressional section lines. Somebody walking into an attorney's office with a potential case could likely could be informed by the attorney, well there is no point in bringing this forward because the status of the law is there is no duty to maintain that road, easement, congressional section line that is unimproved. After 2009, however, that same person may get a different response from the attorney in looking at this and well we've got the facts here and we can argue whether it was unusually hazardous or unusually dangerous. It is a fairly opened ended type of standard with additional facts to deduce whether or not it was in fact to dangerous and you're probably going to be pass summary judgment into a trial of a case.

Representative Koppelman: I think we all understand the desire of the fund, townships etc, to avoid liability. I am not opposed to that. However, the reason we have court is to try cases and this is rare, and there are not a lot of these coming forward. So to desire summary judgment in every case, I understand that from your perspective. On the other hand isn't that why we have courts and is it fair of the citizens if what we attempt to do through statute is simply to close the doors so that no cases are ever tried. I don't think that should be our objective should it?

Steve Spilde: That is a bit of a loaded question. Our interest in bringing this subject matter forward actually to the legislature was precipitated of course by the Kappenman decision. Bear in mind that was the decision of the Supreme Court based on the summary judgment motion of the facts as stated in the opinion were viewed in the light most favorable to the plaintiff as the court must do. The facts weren't proved to the trial and in fact they settled that case after the summary judgment decision. Whether or not the courts should be open, we have a constitutional provision that says the courts should be open and available to citizens. We certainly believe in that. But there are certain aspects of particularly the public liability situations where the legislature in the past has determined as a matter of public policy that it is fairer to lessen the burden on taxpayers with regard to these issues than it is in that balancing test that we're going to allow suits. That's why we have the Poor Claims Act where there are certain immunities for governmental entities state or local that isn't available to private citizens. This is really a public policy decision which the political subdivision committee gets to make. We're just simply advancing the standpoint that the most efficient from the standpoint of the taxpayer and the people we are working for would be to act as were suggesting.

Senator Andrist: We got a good discussion and it's worthwhile, but I would like to remind the committee that the Senate didn't like including natural hazards to begin with, we conceded in that. We put your language in, with certified mail because we thought actually improved it, I thought we had a pretty good understanding of what we're trying to do at our last meeting and I think we should vote on the motion.

Representative Koppelman: I still have a little bit of a concern about certified mail for the reasons previously stated. I think the chairman's plan B is still probably doesn't resolve all of that but I think it's clearer, it would still require a receipt of some sort. **Chairman Olafson:** I will repeat that language if I could. This would replace Subsection A of the amendment, the updated amendment that was handed out this morning. 'The political subdivision is served with written notice that is either in its possession or verified by receipt', so that could be accomplished in any number of ways.

Representative Koppelman: And one of them obviously the clearest would be certified mail. Another might be the return receipt we're talking about with e-mail, I suppose as somebody you have someone look at it and sign it. But it would avoid some of the confusion that I think Mr. Spilde and Senator Andrist have talked about with just having written notice because then you get out of a he said/she said because you do require a receipt. So, since I think that's what Senator Andrist really meant when he was making his motion anyway I would certainly agree with that.

Senator Andrist: I just remind the committee that in 10 years from now, I doubt that anybody would have email records. I think what you're talking is a standard for hard mail, and whether the standard should be a certified mail or whether it should be something you got to sign to keep. I think that's what we're talking about.

Chairman Olafson: I would envision that if we were to adopt this language that it would be anything that could be admissible in court to demonstrate that they received the notice, so that could be email.

Representative Kilichowski: Anything that is admissible in court. If there are 6 guys sitting around having coffee and their talking about it, and talking with the township supervisor, something goes to court and there's no receipt or written notice. Is that still good in court that they were all there and told him?

Representative Kretschmar: That would be admissible evidence but if you think you're going to get people at a coffee table to go into court and say to testify against one of their buddies, you ought to think again.

Chairman Olafson: My response Representative Kilichowski is no that would not be admissible because this does require written notice.

Senator Andrist: I think the language as its printed here keeps us out of court. I would rather keep us out of court than have to get into a fight in court over a technicality as to whether the letter was received or not received or whatever. That's why I prefer it.

Representative Koppelman: Just to clarify where we are here. I think given what we've discussed, I would probably hesitantly vote against the amendment that is printed but vote for your Plan B language that you've discussed, so maybe just to clarify what we have before us and where we are in the motion.

Chairman Olafson: We do not have a motion on the floor from yesterday, correct? We had a motion? **Senator Andrist:** I withdraw motion from yesterday. **Representative Koppelman:** As a point of order, I don't know if we can retroactively amend a motion that we didn't have language for when we made the motion yesterday, so I think the motion that was made yesterday was this language without your boldfaced information here. **Chairman Olafson:** That is correct. It is the amendment without the boldfaced print from yesterday. So that is the motion on the floor. **Senator Andrist:** I move to withdraw the motion from 4-14-2011, and Representative Koppelman stated he will withdraw the 2nd.

Chairman Olafson: I will entertain a motion today. **Senator Andrist:** I would like to move that the Senate accede to the House amendments and further amend with the language in this amendment. **Representative Kretschmar:** 2nd. **Chairman Olafson:** Senate would accede to the House amendments and further amend to adopt this printed.

Representative Koppelman: I think the committee is very close to an agreement. I think we are dealing with just the minor wording question here and I really do think the Chairman's Plan B suggestion is better only because I think it kind of brings us into the 20th Century and puts it back into the real world by allowing. The email would be involved if it could be the return receipt if you prove that it was received not just that it was sent. I think

based on all, it would also satisfy the concern that Senator Andrist had talked about keeping us out of court because it would still require the receipt. So, I am going to resist this motion and hope we can get to Plan B.

Chairman Olafson: Just so we're clear, we are adding the language that was presented to you in boldface print this morning. The written notice is only by certified mail not by any other means, just you're clear about the motion is then.

Rep. Kretschmar: If this motion for amend, the motion on the table passes, will there be room to further amend this? **Chairman Olafson:** No. **Senator Dotzenrod:** I am a little puzzled by that. I would think that anytime that group moves to amend and that amendment is adopted that the option to further amend can never be for-closed to my understanding. **Chairman Olafson:** We would still be able to further amend. I would leave the option; the rule of the chair would be that we could still further amend if someone would like to move to further amend.

Roll call vote: 3 Yeas, 3 No 0 Absent
Motion fails

Representative Koppelman: I would move that the Senate accede to the House amendment that the conference committee further amend with the Chairman's Plan B language which as I understand it is identical to the motion that Senator Andrist made except that it phrases it in a receipt provable or something like that rather than certified mail. I think that is the only change.
2nd - Representative Kretschmar

Chairman Olafson in the area of discussion here is the language that would replace Subsection A in the amendment in front of you. 'The political subdivision is served with written notice that is either in its possession or verified by receipt'. So that would be in addition to the amendment considered in the previous motion. So we have a motion and a second, further discussion. **Representative Koppelman:** it still is a high standard because it requires something in writing, it requires that they have it or can demonstrate a receipt so we're way beyond the coffee shop discussion. I think this is a clear high legal standard.

Roll call vote: 4 Yeas, 2 No, 0 absent.

Chairman Olafson: Motion Fails, because there were not two votes from each chamber.

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
April 19, 2011
16663

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to liability of townships

Minutes:

You may make reference to "attached testimony."

Chairman Olafson reconvened the Conference Committee on SB 2161 in order. All members from the Senate and House were present.

After some conversations with a couple members, I think there is some interest in reconsidering the motion that we had this morning. But first perhaps I should open it up for discussion if someone has some alternative idea other than reconsidering what we voted on this morning.

Senator Andrist: I am willing to acquiesce to anything at this point because it's Friday. For the record I would just like to say that I don't think the two motions we've discussing really have any practical differences as far as township officers are concerned. Other than the motion that I preferred, the amendment that I preferred would've given the township officers a little bit more comfort. If you aren't really having any practical change in the value you might as well pass it but on the other hand, I want to express that reluctance because I also have an interest in making life better for people who really do care about these bills. I don't think we're going to see more lawsuits for another 75 years anyway.

Representative Kretschmar: Just procedurally, can we just start out or do we have to reconsider what we did earlier? **Chairman Olafson:** I think we'd need a new motion. That would be the easiest.

Representative Kretschmar: I would be willing to make the motion that we made this morning. The same one? The one we defeated this morning. **Chairman Olafson:** Is there a second? **Representative Koppelman:** 2nd. **Chairman Olafson:** Just so we clarify the motion, the motion would then be that we adopt the amendments that we considered this morning adding the description of unusually hazardous and unusually dangerous so it would add the words meaning in the context of this subsection, it is so peculiarly dangerously there substantial risk that a person exercising due care in driving within the limits of the law could not drive on that part of the congressional section line safely and then we would replace when it's put into context, that subsection A, which currently says

the political subdivision is served with notice of the condition by certified mail and so we would replace that with ' the political subdivision is served with written notice that it is either in its possession or verified by receipt and (add the word and there). **Representative Koppelman:** I 'm sorry that I just didn't follow where you were putting the and. **Chairman Olafson:** At the end of that sentence. I think we have to have the and there. **Representative Koppelman:** So, be certified mail and then your language you added about...**Chairman Olafson:** No, we would replace that with this. We would replace Subsection A with this language of the political subdivision is served with written notice that is either in its possession or verified by receipt: and... because then the other conditions have to apply. **Representative Koppelman:** Well just to comment, after what has been said, I agree that there is very little difference in the two motions we were discussing earlier. I think there is a slight difference though and just to point out for the record what I think it is, I believe that you're Plan B as we called it is a little bit broader, not a lot, but what it would do, it clearly forestalls the other questions we've discussing and maybe that's appropriate because that can be hearsay, misunderstood, whereas when we're dealing with something in writing it is clear. The question of notice, clearly this would include certified mail which we've discussed, but I think it brings it into the 21st century by also including an email with a return receipt and that sort of thing. On the other hand, one other thing that it does do, and we've been talking a lot about townships, I believe this section of code governs other political subdivisions like counties and so on. If someone writes to their county commission and it wouldn't be certified mail, and it wouldn't be an email with a return receipt but it would be a letter and they had it on file that would cover the other part that you mentioned about having it in their possessions. So I think it does broaden the reach a little better and tilts the balance just ever so slightly and I think it is a reasonable compromise. **Chairman Olafson:** Yes that is correct and I am glad you brought that point up because we've been talking about townships all the time but of course in the counties where they are not organized townships then we always have to be mindful of that. We tend to focus on townships whereas there is a general rule that organized townships are the rule in the east and not so much so in the west. Is there any further discussion on the motion? Is everybody clear on what the motion is and the language that we would adopt with the motion if approved.

Chairman Olafson asked for a roll call vote. Yeas 6, 0 No, 0 Absent

2011 SENATE STANDING COMMITTEE MINUTES

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Red River Room, State Capitol

SB 2161
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16663

Conference Committee

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Chairman Olafson asked for a roll call vote. Yeas 6, 0 No, 0 Absent

2011 SENATE STANDING COMMITTEE MINUTES

Senate Political Subdivisions Committee
Red River Room, State Capitol

SB 2161
April 19, 2011
16751

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to liability of townships

Minutes:

You may make reference to "attached testimony."

Chairman Olafson called the conference committee for SB 2161 to order. All 6 conferees are present.

Committee members to give you some sense of the Senate floor discussion yesterday. The main objection seems to be including natural hazards, so that is the reason we are back here at the table. I think it might be helpful if we would have at the beginning of our discussion have a discussion about the fact I think we all agree and I want to get some sense of this we all agree we need to pass a bill which will clarify the issue before us. I think not passing a bill is something we need to avoid. We need to get something passed and hopefully we can come to an agreement.

Senator Andrist: I felt we carried the bill quite fairly but there was a kick back on these natural hazards. Among other things that was pointed out to us it is not specific to a natural hazard, theoretically one trial lawyer could send a letter or it wouldn't have to be a constituent, could send a letter and say there are a whole lot of natural hazards in the Badlands and we request that you address them and put up signage for them. This is the part that kind of troubled me and thought maybe we did need to talk about it a bit more. I would be really comfortable if we take the natural hazards out of there. It was earlier done in the Senate. Man-made hazards we acquiesced on that and we still acquiesce on that.

Representative Koppelman: Where we find ourselves though is I feel that the House moved quite a bit from its position with the Chairman's recommended amendments that we ended up passing. If we can't find agreement in this committee or in the two chambers what we may be left with as the chairman alluded to is the Supreme Court decision. I think that is a much worse scenario for political subdivisions in North Dakota. So that creates somewhat of a concern. I went over and talked with Chairman Olafson before signing the conference report because there was one reference in there that I haven't remembered us discussing about and he reminded me of the application, but I think the wording was a little vague even so, and that is something we may want to look at. But that is said something to the effect in the conference report that if a in terms of mitigation that if they mitigate the hazard,

if they warn of the hazard or if they order mitigation of the hazard. I read that and I thought what does that really mean? Do you tell the guy that runs the road grater to go and fix this and he doesn't do it after they ordered it and they are okay or what. The chairman reminded me that was intended by that is that they would order the land owner to do that and maybe that should be clarified who that person is. The bottom line I think members of the committee is I know that had the legislator who chaired the subcommittee in the House been on this conference committee I don't think we would've had the compromise we came up so I think there is some stronger feelings amongst some of the House than the rest of this committee. I am trying to find some kind of neutral ground.

Representative Kilichowski: I have no problem with the natural hazards being eliminated as of now. But if a torrential rain comes and there are two or three washouts, and the township or the county are aware that these washouts are there, and they don't do anything to either post it or fix it, somebody has got to be liable; anything existing now I have no problem with, but that I do have a problem.

Chairman Olafson: So you would support if we could have language that would address a suddenly occurring hazard. **Representative Kilichowski:** Yes I would. And that would put actual knowledge back in it then? **Chairman Olafson:** No. **Representative Kilichowski:** it would still have to be by written or receipt. **Chairman Olafson:** I think that is critical. I think the actual knowledge language opens up such a Pandora's box of possibilities that I think the written verifiable written receipt is essential. **Representative Kilichowski:** After we spoke yesterday do you draft up an amendment. **Chairman Olafson:** I did.

Chairman Olafson: If the committee would be agreeable to considering addressing natural hazards that are suddenly occurring then I believe these amendments will address that. The second page of what I handed out puts it in context. So the political subdivision would not be liable for any claim based on a condition on that congressional section line, then go down to C; if the condition is naturally occurring it has occurred within 30 days prior to the written notice provided for in subsection A. In other words if there is a cliff, rock, cottonwood tree that has been there for 100 years that doesn't count. That is not included, but if its something that has suddenly occurred that has suddenly changed the topography and has created a hazard and then written notification is received then the political subdivision has a responsibility to address it.

Representative Koppelman: I am not opposed to considering something along these lines although I am not sure if 30 days is the magic number or if there is another way to articulate that. I am certainly open to this idea. I would however like us to take a look at item D, only with respect to the question that I raised earlier because when I look at this issue of ordering mitigation, two questions come to mind. 1) who's ordering what; who is responsible 2) do the townships even have the authority to order a land owner and can they do that even if it's not the landowner's fault. All those kinds of things come to my mind. **Chairman Olafson:** In response to that, I am certainly agreeable to looking at that but I think that is a separate issue. But certainly I would support clarifying that because I think we could clarify that just the fact that you raised the question means it can be questioned.

Representative Koppelman: With your additional language I guess I don't have necessarily a problem with it, I am just trying to walk it through in my own mind and try to figure out exactly how this would work. Natural occurring hazard when you say it occurred

in within 30 days, its natural unless it is a cataclysmic event, you know, but if its something that has been eroding for 50 years and all of a sudden it falls through and that happened in 30 days or is somebody going to come back and say well that didn't happen in 30 days, it's the end result. **Chairman Olafson:** I think the key words in your question would be all of a sudden it fell through. **Representative Koppelman:** In that case maybe instead of occurred, we could embellish that a bit to say, occurred , or substantially changed to clarify the kind of scenario I was just describing. I would move that the committee with the intention to further discuss the other items, further amend. I would move that the committee adopt the language offered by the Chairman with the words after the word "occurred item c add or substantially changed; I think we're talking about natural and you have to have some kind of a qualifier there. I would move that again with the intent to further amend on the other topic.

Chairman Olafson: We have a motion on the floor, is there a 2nd? Senator Dotzenrod 2nd. The motion has been made and seconded. So the motion is to add, 'or substantially changed after the word, occur'. **Representative Koppelman:** The only reason I suggest that is that these can be in the works for a long time if they are natural by definition unless they are cataclysmic and that probably is the case and then something can happen suddenly but when you say it occurred within 30 days I am not sure your only talking about that last phase of what happened suddenly, you're talking about the hazard occurring within 30 days. So I think occurred or substantial changed kind of encompasses either scenario where it's a flood that has come through and broken something out suddenly or it is a natural process that all of a sudden the last phase of that process occurred and substantial altered the landscape. **Senator Andrist:** What if we said the condition is naturally occurring, it has occurred or has substantially worsened within 30 days prior to the written notice. **Representative Koppelman:** I would consider that a friendly amendment to my motion and would have no problem with that. **Chairman Olafson:** I see heads nodding, but we can't put that on the record. There seems to be a consensus of nodding heads. Lets determine what would be the proper motion then, it would be for the House to recede from the House amendments and the committee further amend. We have an amendment on the floor and I think it might be better to withdraw that amendment and make a new amendment.

Representative Koppelman: I will withdraw that motion and the representative who seconded that motion withdraws his 2nd; and I would make another motion that we adopt the written language before us with the addition. The House recede from this amendment that the conference committee further amend by the language that is before us with the addition after the word, 'occurred' with the words 'or substantially worsened'. **Chairman Olafson:** We have the motion before us, is there a second? A second came from Representative Kretschmar (11.0403.02003).

Chairman Olafson: So it would read, if the condition is naturally occurring it has occurred or substantially worsened within 30 days prior to the written notice provided for in Subsection A and... okay. Any further discussion on the motion. **Representative Kretschmar:** this is fine. You know I am sure there will be members of the bar that will look at these very carefully depending on the fact situation that arises, they are going to have questions but I am happy that we still have the doctrine of assumption of risk in our law. It's comparative negligence between parties and so forth, and I am sure whatever bill finally comes out, one comes out or nothing comes out, Mr.Spilde and his insurance company will be able to

underwrite policies for townships; maybe increase the insurance premiums they will still be protected I am sure.

Senator Andrist: I am still trying to get the gist of all this. **Representative Koppelman:** If it's the proper procedure maybe we could move on to the discussion of the other item.

Senator Andrist: I am trying to decide where we are with a man made hazard, we are no longer addressed a man made hazard. **Representative Koppelman:** If I understood your previous proposed solution which was what the committee passed out; which is really what we are working from here. I think it eliminated the distinction between man-made and natural hazards it just included all hazards. What we've done here if we add this Item C as suggested is we're kind of injecting the idea of natural and as an exception to the standard which applies to both of the rules. **Chairman Olafson:** This change would not affect man made hazards. Are we ready to act on this motion before we move on to the discussion of Subsection B?

Roll call vote: 6 Yeas 0 No 0 Absent

Chairman Olafson: Discussion of Subsection B and the concern that Representative Koppelman expressed was that it not maybe as clear to understand as we could possibly have it. **Representative Koppelman:** Do townships and I know we talked about this and it encompasses other political subdivisions like counties too in some cases, and I would assume counties would have this authority but do townships have the authority to order a landowner to mitigate a hazard? Is that within their scope? **Chairman Olafson:** You will find your answer in Section C at the bottom. There it is. We're giving them the authority.

Representative Koppelman: With that language and mine, maybe we could resolve my questions simply by saying, after the word mitigation in Item D, if we were to use that same language and say, by a person the person that causes or contributes to the hazard. That is what I am getting at if we just clarify the idea. **Chairman Olafson:** Or fails to order the person who caused or contributed to the condition to mitigate the condition.

Representative Kilichowski: Isn't that spelled out in C? **Chairman Olafson:** I think it is.

Representative Koppelman: it is spelled out in C, that they have the authority to issue an order. What isn't clear in D, I think is what they are talking about. Because when I first read that, and reading it on its own, and I thought order mitigation, what does that mean? Does that mean that the township officers told the guy who runs the road grater to go and fix this, he didn't do it, so therefore the township is off the hook. They ordered it to be fixed but it just wasn't clear to me. That's why I was thinking if and maybe this would read appropriately if we were to say 'after the word condition, add by the person who causes or contributes to it. It would then say the political subdivision either fails to take action to mitigate the condition or fails to order mitigation of the condition by the person who causes or contributes to it, or fails to provide warning that the congressional section line has a hazardous condition, etc. **Representative Kilichowski:** I think we're kind of mudding this up here. I would think that if a township or a county told there employee to go out there and take care of it, that would be done. **Representative Koppelman:** I am not suggesting it wouldn't I am just saying that the wording in Item C doesn't clearly state who is being ordered to do what. It just says order mitigation. What does that mean? So my point was it just needed to be a little clearer. I think if we tie the same language or something similar that is in C. **Chairman Olafson:** As I listen to the discussion here, they may not issue the order, maybe they aren't issuing the order to the person who caused the condition, maybe

there issuing the order to a independent contractor or employee of the county. So if they order mitigation of the condition, that order has to be followed. **Representative Koppelman:** If we go down that road, then we have a whole another discussion because then we're saying is the and this is not our intent, if we go down that road I think we're indicating then if we offer immunity, if they issue an order is they have no responsibility to see to it that the order is carried out. If the Department of Transportation hires a sub contractor to fix a piece of road and the subcontractor doesn't do it, the DOT is going to get after that subcontractor and either fire them or make sure they finish the job. It is still the responsibility of the agency ordering the work to be done to make sure that it's not only, they can't hide behind the fact that they didn't complete the order. So I don't think the intent is to imply that there would be immunity if just a piece of paper is there. **Senator Andrist:** I don't particularly object Rep. Koppelman's wordsmithing on this. I think it is there by implication there anyway. I guess I would agree with Rep. Kilichowski that we're trying to wordsmith this thing to death. **Chairman Olafson:** May I suggest that we ask Mr. Spilde to comment at the podium. **Senator Andrist:** My concern committee members, is helping these townships officers stay out of court. **Representative Kilichowski:** When you start talking about Subsection C, does not Subsection B pertain to that saying any person that causes or contributes? That is the one that would be mitigated to us. Right? **Chairman Olafson:** I am not sure I understand the question. **Rep. Kilichowski:** In Subsection B it says that any person that causes or contributes to an unusual hazard or unusual condition. Okay. Is liable for damages, or maybe liable for damages, so that indicates that the order would be going directly to the person involved. **Representative Koppelman:** there might be a simpler way to accomplish it and maybe instead of all the words that I've suggested a moment ago, maybe after subsection 1D here, after the word condition we could say, ' as provided in subsection C below'. Then it would clearly tie and it would be very clear of what we are intending. It would tie it to that authority to issue an order directing mitigation. **Steve Spilde:** I think either of the suggestions made by Representative Koppelman would be fine. The first or last one, maybe the last one would be even better, because it keeps it at least within the section. **Representative Koppelman:** I would move that we further amend the language before us and in Subsection 1D after the word condition on Line 2; that we add the words as provided in subsection C below and LC can clean up the order. We know what we're referring to then.

Chairman Olafson: Subsection 7 C, and they will come up with the appropriate language for. Is there a second to that motion? **Representative Kretschmar** 2nd.

Senator Andrist: As we start out with the number 7 up there and then we say 'one is not liable and we have A,B,C,D and then we go to B, it seems to me that B and C should be 2 and 3. **Chairman Olafson:** I think that is an issue for Legislative Council to figure out. Further discussion. Upon hearing none, the motion to clarify the motion is subsection 1B, after the word condition, the wording would be added, 'as provided for in Subsection C of Subsection 7".

Roll call vote: 6 Yeas, 0 No, 0 Absent

Chairman Olafson: Motion prevails. Conference committee adjourned.

2011 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Senate Political Subdivisions

Bill/Resolution No. 2161 as (re) engrossed

Date: 4-12-2011

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 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: _____ Seconded by: _____

Senators	4/12	4/14	4/15	Yes	No		Representatives	4/12	4/14	4/15	Yes	No
<i>Senator Cleason</i>	✓	✓	✓	✓			<i>Rep. Hoppelman</i>	✓	✓	✓		✓
<i>Senator Orlin</i>	✓	✓	✓	✓			<i>Rep. Kretschmer</i>	✓	✓	✓	✓	
<i>Senator Polzner</i>	✓	✓	✓		✓		<i>Rep. Kilichowski</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. 2161 as (re) engrossed

Date: 4-15-2011

Roll Call Vote #: 3

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: _____ Seconded by: _____

Senators	4/15	Yes	No		Representatives	4/15	Yes	No
<i>Senator Nelson</i>	✓	✓			<i>Rep. Koppelman</i>	✓	✓	
<i>Senator Andrist</i>	✓	✓			<i>Rep. Metzger</i>	✓	✓	
<i>Senator Holzner</i>	✓	✓			<i>Rep. Kiliachowski</i>	✓	✓	

Vote Count: Yes 6 No 0 Absent 0

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 Subdivisions

Bill/Resolution No. 2161 as (re) engrossed

Date: 4-19-2011

Roll Call Vote #: 4

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. Koppelman Seconded by: Rep. Kretschmer

Senators	4/19			Yes	No		Representatives	4/19			Yes	No
<u>Sen. Blafson</u>	✓			✓			<u>Rep. Koppelman</u>	✓			✓	
<u>Sen. Andrist</u>	✓			✓			<u>Rep. Kretschmer</u>	✓			✓	
<u>Sen. Dotzenrod</u>	✓			✓			<u>Rep. Hilsenrath</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

2011 SENATE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Senate Political Subdivisions

Bill/Resolution No. 2161 as (re) engrossed

Date: 4-19-2011

Roll Call Vote #: 5

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: _____ Seconded by: _____

Senators				Yes	No	Representatives				Yes	No
<i>Sr. Olafson</i>	<i>41</i>			✓		<i>Rep. Hoppelman</i>				✓	
<i>Sr. Andrews</i>				✓		<i>Rep. Kretchmar</i>				✓	
<i>Sen. Dotzwood</i>				✓		<i>Rep. Kilichevski</i>				✓	

Vote Count: Yes 6 No 0 Absent 0

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 2161, as engrossed: Your conference committee (Sens. Olafson, Andrist, Dotzenrod and Reps. Koppelman, Kretschmar, Kilichowski) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ page 1151, adopt amendments as follows, and place SB 2161 on the Seventh order:

That the House recede from its amendments as printed on page 1151 of the Senate Journal and pages 1308 and 1309 of the House Journal and that Engrossed Senate Bill No. 2161 be amended as follows:

Page 1, line 17, remove the underscored colon

Page 1, line 18, replace "(1) is" with "is"

Page 1, line 18, replace "naturally occurring hazard" with "condition"

Page 1, line 19, remove "; and"

Page 1, remove lines 20 through 23

Page 2, replace lines 1 through 4 with ", unless:

- (1) The political subdivision is served with written notice that is either in its possession or verified by receipt;
- (2) The condition is unusually hazardous or unusually dangerous, meaning, in the context of this subsection, it is so peculiarly dangerous there is a substantial risk that an individual exercising due care and driving within the limits of the law could not drive on that part of the congressional section line safely; and
- (3) The political subdivision either fails to take action to mitigate the condition or fails to order mitigation of the condition, or fails to provide warning that the congressional section line has a hazardous condition, as soon as is practicable, but not to exceed ten days after service of the notice."

Page 2, line 5, remove "paragraph 2 of"

Page 2, line 5, remove "creates a"

Page 2, line 6, replace "hazard by altering" with "causes or contributes to an unusually hazardous or unusually dangerous condition on"

Page 2, line 6, replace "is" with "may be"

Page 2, line 6, remove "any"

Page 2, line 6, remove "caused"

Page 2, line 7, remove "by the alteration"

Page 2, line 8, replace "seek" with "issue"

Page 2, line 8, replace "alters" with "causes or contributes to an unusually hazardous or unusually dangerous condition on"

Page 2, line 9, remove "restore the congressional section line to its original"

Page 2, line 10, replace "state" with "mitigate the condition"

Renumber accordingly

Engrossed SB 2161 was placed on the Seventh order of business on the calendar.

REPORT OF CONFERENCE COMMITTEE

SB 2161, as engrossed: Your conference committee (Sens. Olafson, Andrist, Dotzenrod and Reps. Koppelman, Kretschmar, Kilichowski) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ page 1151, adopt amendments as follows, and place SB 2161 on the Seventh order:

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Page 2, replace lines 1 through 4 with ", unless:

- (1) The political subdivision is served with written notice that is either in its possession or verified by receipt;
- (2) The condition is unusually hazardous or unusually dangerous, meaning, in the context of this subsection, it is so peculiarly dangerous there is a substantial risk that an individual exercising due care and driving within the limits of the law could not drive on that part of the congressional section line safely;
- (3) If the condition is naturally occurring, it has occurred or substantially worsened within thirty days before the written notice provided for in paragraph 1; and
- (4) The political subdivision either fails to take action to mitigate the condition or fails to order mitigation of the condition as provided for in subdivision c, or fails to provide warning that the congressional section line has a hazardous condition, as soon as is practicable, but not to exceed ten days after service of the notice."

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Page 2, line 10 replace "state" with "mitigate the condition"

Renumber accordingly

Engrossed SB 2161 was placed on the Seventh order of business on the calendar.

2011 TESTIMONY

SB 2161

SB 2161 – Relates To Political Sub-Division Liability & Obstruction In Highways.

Political Subs – Red River Room -Thursday, 1/20/11 9:30 AM

Good Morning! Chairman Andrist & Members of the Committee. I am Gary A. Lee, Senator from District 22.

The Public Land Survey System is a way of subdividing and describing land. Lands in ND are subject to subdivision by this rectangular system. The PLSS typically divides land into 6-mile-square townships, townships are subdivided into 36 one-mile- square sections.

In ND these section lines are considered public roads, open for public travel & defined as being 66 feet wide. But, North Dakota probably has thousands of miles of unimproved/unmaintained section lines.

In recent Court cases Political Subdivisions have been held liable for injuries that have occurred on these unimproved/unmaintained section lines. In many cases, the accidents have involved a recreational vehicle.

SB 2161 seeks to modify the definition of highway or public street. In Section 1, the new definition would not include a section line that is unimproved or unmaintained.

Section 2 of the Bill, addresses the liability for claims, regarding these unimproved or unmaintained section lines. The local Political Subdivision would not be held liable. The State of ND all ready enjoys this protection.

Mr. Chairman & Members of the Committee, I am confident you will give SB 2161 a good hearing. I encourage your support of the Bill.

Testimony to the
SENATE POLITICAL SUBDIVISIONS COMMITTEE
Prepared January 20, 2011 by the North Dakota Association of Counties
Aaron Birst, Legal Counsel

CONCERNING SENATE BILL 2161

Chairman Andrist and members of the committee, the North Dakota Association of Counties is here today to strongly support SB 2161 which is the result of a broad coalition of political subdivisions.

SB 2161 is an attempt to clarify responsibilities and liabilities for unimproved sections lines. As you are all aware of, North Dakota has thousands of miles of Congressional section lines which are no more than prairie trails that are in their natural state. Those section lines (every square mile) are required to remain open pursuant to both Federal and State law. Although these section lines are rarely traveled by the general public occasionally, they do carry some traffic whether it is the local farmers getting to their fields, hunters or just individuals engaging in recreational activities.

As you are also aware, there is no possible way for a political subdivision to remedy any potentially unusually dangerous conditions that may occur on these unimproved section lines. With such limited resources, political subdivisions have to focus their efforts on the roads that they currently maintain.

In 2009, the North Dakota Supreme Court placed an additional liability on all political subdivisions by holding that political subdivisions have a duty to warn the public of any unusually dangerous conditions that exist on even unimproved sections lines. This becomes problematic since how to determine an unusually dangerous condition on an unimproved section line is difficult since by their very nature of being unimproved those trails posse some inherent dangers.

Currently, the State legislature has already provided the State protection from liabilities for claims that result in injuries occurring on unimproved property owned or leased by the state in NDCC 32-12.2-02. We believe political subdivision also should be afforded some of these same protections the State is provided.

Certainly, cases where someone is seriously injured or killed is tragic and no one wants to see that happen but placing a legal duty on government where they have undertaken no action but are simply complying with Federal and State law to keep section lines open is, in our opinion, unreasonable.

For the following reasons I ask that you support Senate Bill 2161.

Thank you.

TESTIMONY OF STEVEN SPILDE
CEO, NORTH DAKOTA INSURANCE RESERVE FUND

to the
NORTH DAKOTA SENATE POLITICAL SUBDIVISIONS COMMITTEE
REGARDING SENATE BILL NO. 2161

January 20, 2011

Chairman Andrist and Members of the Senate Political Subdivisions Committee, my name is Steve Spilde - I am the Chief Executive Officer of the North Dakota Insurance Reserve Fund ("NDIRF") and appear today in support of Senate Bill No. 2161.

The NDIRF is a self-insurance pool that currently provides liability coverage to all counties and nearly all townships in North Dakota, along with most other political subdivisions in the state.

The NDIRF supports SB 2161 and urges a "do-pass" recommendation because we feel it will alleviate financial burdens of increased litigation costs and the expenses of locating, purchasing, installing and maintaining appropriate signage, placed upon North Dakota political subdivisions as a result of a 2009 North Dakota Supreme Court ("Court") decision - Kappenman v. Klipfel, (2009 ND 89).

SB 2161 deals with congressional section lines that either have never been improved to an actual road or have fallen into disuse and are no longer maintained - the ubiquitous prairie trails, which more or less follow section lines but deviate around natural obstructions - that most of us have used at one time or another and that all of us should be expected to recognize as requiring extra caution because they are obviously not maintained. The bill does not address liability for congressional section lines where actual roads have been built and are regularly maintained or where they have been designated as minimum maintenance roads.

Prior to Kappenman, statutory and case law in North Dakota indicated that townships and counties clearly did not have a duty to maintain an improved road on every section line but also that they were not liable for injuries to persons using unimproved section lines.

In Kappenman, however, the Court declared that a township or county with actual knowledge of an "unusually dangerous" or "unusually hazardous" condition on an unimproved section line now has a

duty to warn travelers of that condition. The practical effect of this very subjective standard is that whether a township or county had actual notice of such a condition and whether that condition met the test of "unusually dangerous" or "unusually hazardous" will likely be a fact issue in most claims, to be resolved through trial. Summary judgment, a timely and financially efficient procedural motion to dispose of claims not supported by law, then becomes unlikely even to be raised. The difference in cost of defending a claim between summary judgment and trial is dramatic.

In addition, the NDIRF is familiar, through having defended claims against townships and counties regarding road condition issues in the past, with the financial difficulties these political subdivisions encounter in providing and keeping up-to-date, appropriate signs on the road network that is actually built and maintained. A newly minted duty to deal with these expenses for unimproved or unmaintained congressional section lines, which are actually nothing more than easements for the benefit of public travel unless or until an actual road is constructed thereon, is unduly burdensome. In our view, it is not unreasonable to expect from the traveling public that minimal degree of responsibility necessary to recognize the need for caution.

Passage of SB 2161 would restore order to the continuum of liability for township and county roads, where these political subdivisions continue to have duties under the law for established and maintained roads; can obtain, through prescribed statutory procedures, immunity from liability for established roads that are minimally maintained; and would again have no duty with regard to unimproved or unmaintained congressional section lines.

Thank you. I would be pleased to respond to any questions the Committee may have.

Testimony from the North Dakota Township Officers Association
By Kenneth Yantes Executive Secretary
1-20-2011

Chairman Andrist and Senate Political Subdivisions Committee Members:

My name is Kenneth Yantes and I am the Executive Secretary of just under 6,000 locally elected township officers. I have come here today to ask for your support for SB2161.

The decision made in the 2009 Kappenman VS Klipfel Supreme Court case has greatly increased township liability on those section lines that are unimproved and not maintained in our townships

I hope that when you decide how you are going to vote on this bill that you will consider the thousands of miles of section lines that we have in our state.

Townships already have 56,755 miles of improved section lines that we have responsibility for. These section lines are improved; they have roads built on them and are maintained by locally elected township officers. We have the signing, weed cutting, snow removal and hazard vigilance responsibility over our road systems.

We are trying our best to keep the driving surfaces safe for the traveling public with the limited funding we have.

To require every unimproved or not maintained section line to be continually checked and signed would be a monumental task. If we are taking care of 56,755 miles of improved roads now, consider the effort required to care for all of the

unimproved and not maintained section lines in our state.

I don't have the exact number of miles of unimproved and not maintained section lines but I would hazard a guess that for every one mile that is improved there maybe two or more than that are not.

If township officers have actual knowledge of a dangerous obstruction they should remove it or at the very least warn the traveling public with a warning sign.

Without actual knowledge of a dangerous condition how can they be held responsible ???

Please vote to pass SB2161 as it has the measure of common sense within it that is found in North Dakotans.

19 January 2011

Senator John Andrist, Chair
Senate Political Subdivisions Committee

Re: **Senate Bill 2161**

Dear Senate Judiciary Committee Members:

My name is David R. Bliss and I appear today on behalf of my clients, Al Kappenman and Julie Tharen. We oppose SB 2161 as written and ask this committee for a *do not pass* recommendation of the bill as it is written.

SOVEREIGN IMMUNITY DOCTRINE BANNED BY OUR SUPREME COURT.

Sovereign immunity was abolished by the North Dakota Supreme Court in the Bulman v. Hulstrand decision, 521 N.W. 2d 632 (N.D. 1994). Sovereign immunity means that “the king can do no wrong.” Back in the old days, the King of England had no court above him, and he could not be sued despite any bad things he might have done to his subjects.

Our own constitution guarantees access to the courts by our citizens:

“All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.” Article 1, Section 9.

No agency or political subdivision should be above the law. As Justice Sandstrom said in his Bulman concurrence, “In America, we hold that government receives its powers from the people, not that people receive their rights from the government. This idea is embodied in our Declaration of Independence. The concept of sovereign immunity harkens back to an older idea – one inconsistent with our American democracy.”

The Bulman court said that “we are aware of no public policy reasons to continue a constitutional interpretation that condones an absolute bar to tort liability...[W]e conclude that the State’s sovereign immunity for tort liability is outdated and is no longer warranted.”

THERE IS NO PERSUASIVE PUBLIC POLICY REASON TO ALLOW GOVERNMENTAL IMMUNITY.

- Whatever justifications initially existed for sovereign immunity, they are no longer valid in today's society.
- Few principles of modern law have been so uniformly and soundly criticized.
- Sovereign immunity from tort liability, like the governmental immunity for political subdivisions, perpetuates injustice by barring recovery for tortious conduct merely because of the status of the wrongdoer.

- Sovereign immunity contradicts the essence of tort law that liability follows negligence and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment.
- The doctrine of sovereign immunity is harsh, results in injustice and is counterintuitive to any ordinary person's sense of justice.

**BRASON KAPPENMAN WAS KILLED ON A SECTION LINE IN ALBION
TOWNSHIP IN DICKEY COUNTY, NORTH DAKOTA.**

- On August 1, 2006, Brason Kappenman was killed when the 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 and was on his way home when his tractor quit. Brason Kappenman ultimately drove on the section line and into the trench.
- The 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. The Dickey County Sheriff's Office incident report noted the washout "was hard to see until you were right on it."
- Albion Township knew about the trench but did nothing. After Brason's death, Albion Township placed a "road closed" sign on the section line.
- In June 2007, Brason's parents brought a wrongful death action against the landowner and Albion Township.

**NORTH DAKOTA SUPREME COURT SAID TOWNSHIP WAS LIABLE FOR ITS
FAILURE TO WARN ABOUT THE DANGEROUS CONDITION**

Kappenman v. Klipfel

- In *Kappenman v. Klipfel*, the North Dakota Supreme Court stated, "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."
- "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."
- Although Albion Township stressed its "small budget," it acknowledged that it may not have cost much for the township to dump some gravel or place some flags on the section line at issue.

**TOWNSHIPS SHOULD BE HELD ACCOUNTABLE LIKE OTHER BRANCHES OF
GOVERNMENT**

- Townships should be liable for the torts they commit.
- Brason Kappenman died because of the township's refusal to warn of a known hazard of which they had actual knowledge.

SB 2161

Attached are copies of the Kappenman v. Klipfel opinion, NDCC 32-12.1-03, and NDCC 32-12.2-02. Both of the statutes set forth the potential liabilities of the state and political subdivisions within the state. In discussing the issue with Legislative Council the question dealing with what the difference between state liability and county or township liability comes down to a matter of policy. In his concurrence, Chief Justice VandeWalle left it up to the Legislature to amend current statutes to show the intent of the legislators regarding liability of county/local government.

Main Policy Concerns:

-The main policy argument in support of SB 2161 is the idea that the political subdivisions cannot be liable for everything, especially since the majority of them do not have the resources to do so.

-The main policy argument in opposition of SB 2161 is that, with passage of the bill the political subdivisions will have little reason to take care of any issues that may arise.

If you have any further questions regarding the issue I would be happy to contact Legislative Council.



1 of 46 DOCUMENTS



Positive
As of: Jan 20, 2011

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

No. 20080184

SUPREME COURT OF NORTH DAKOTA

2009 ND 89; 765 N.W.2d 716; 2009 N.D. LEXIS 96

May 26, 2009, Filed

PRIOR HISTORY: [***1]

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

DISPOSITION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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.

OPINION BY: Mary Muehlen Maring

OPINION

[**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 [***2] for further proceedings.

1

[*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 [**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 [***3] 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 [***4] 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 [***5] 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 [**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 [***6] 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 de-

nials 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 [***7] 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 [***8] 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 [***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 [***9] 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 [***10] 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 una-

ble 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 [***11] 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 [**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 [***12] 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 [***13] 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 [***14] 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 [**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 dif-

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ferent 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) [***15] (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 [***16] 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 Bra-

son 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 [***17] analyze the location of the accident.

[**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 [***18] 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 Socy*, 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 [***19] 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 [***25] that the chapter "does not limit in any [***20] 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 [***21] 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 [***22] 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 [**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 [***23] 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 [***24] 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 [***25] 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."" *Murrek v. Cleveland Metroparks Bd. of Commrs.*, (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 [**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) [***26] ("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 [***27] 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] [***28] 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 sect[i]on 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 [**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. [***29] 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 [***30] 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, [***31] 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)*, [**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 [***32] 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 [***33] Honorable James M. Bekken, D.J., sitting in place of Kapsner, J., disqualified.

CONCUR BY: Gerald W. VandeWalle

CONCUR

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 [***34] in *Hovland*, the Legislature amended the statute [**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 [***35] 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 *Leet*, 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 *Leet* the worker did not enter the auditorium for recreational purposes. Here the township argues that Kappenman was using the road for [***36] 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.

Testimony of Julie Ness – January 20, 2011

I wish to express my concern over Senate Bill No. 2161. In August, 2006 my son was killed on a section line road on which a landowner had dug a trench across the road. For years this hazard posed a risk and was brought to the attention of township board members, but they did nothing.

Individuals and entities alike need to be held accountable for known dangerous conditions, no matter where the danger exists, if there is public access.

Living in a rural area myself, I understand the financial budget dilemmas many townships face. My father and brother have served combined time as township officers for over 60 years. They do their best to protect the public and maintain the safety of all public access roads. We cannot release these entities from any consequences for their negligence. Doing so will allow for the erosion of known dangerous areas to literally take lives. Townships are insured for circumstances out of their control. I am sure the insurance company holding a township policy would love to be relieved from the exposure to that risk.

I should be preparing for a graduation celebration this spring. But because of a neglected known hazard on a section line road my son, Brason Kappenman, will not be joining the class of 2011.

Respectfully submitted,

Julie Ness

Testimony of Al Kappenman – January 20, 2011

To Whom It May Concern:

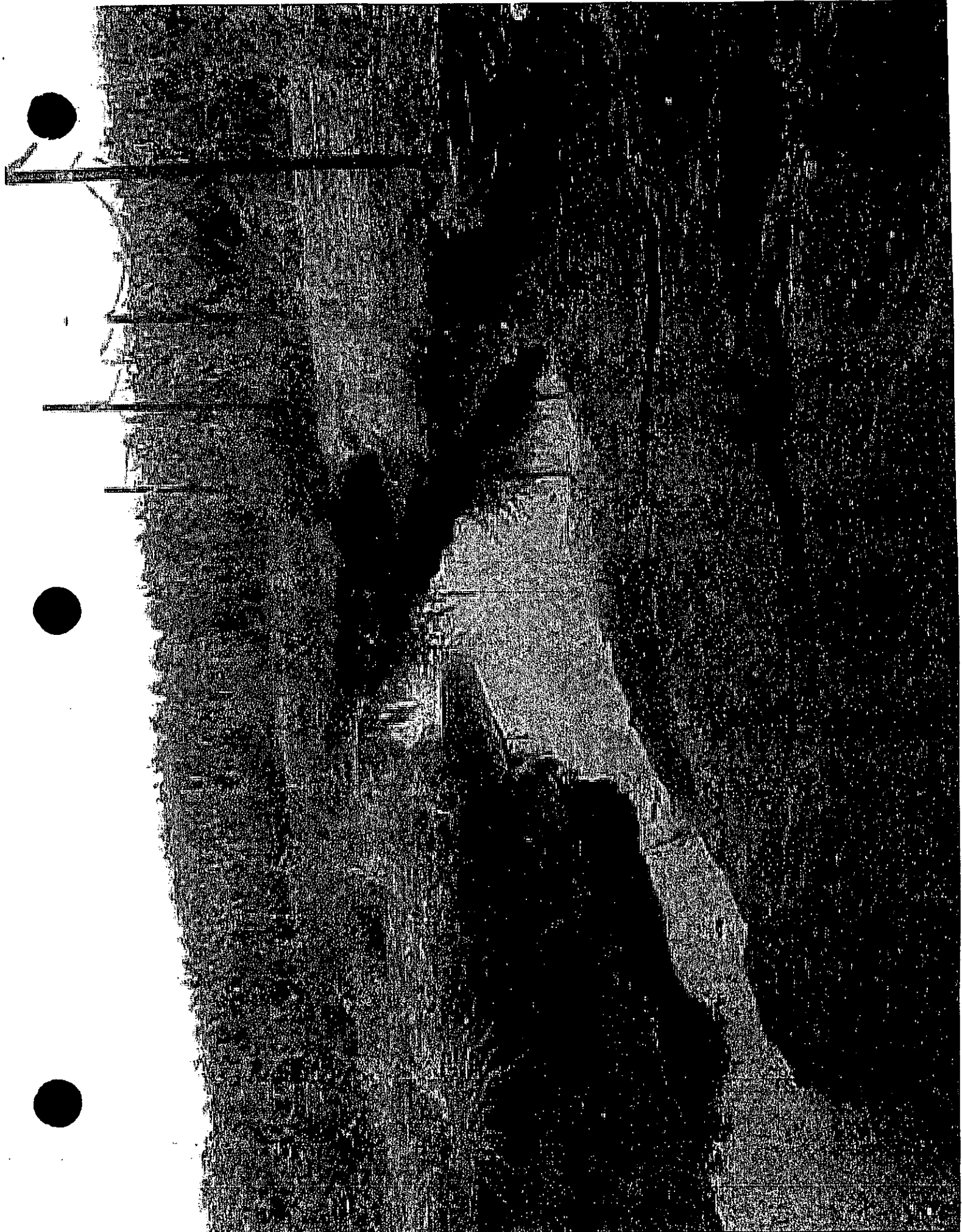
My name is Alfred Kappenman, from Ellendale, ND. I lost my son, Brason Kappenman, due to the township not taking responsibility for fixing a trench in a section line after they had notice of it.. This is by far the hardest experience in my life. It has been over three years since his passing and there isn't a day that goes by that I don't think of him. He was out for a ride, enjoying the country side when he came across an unmarked trench. You could not see the trench until you came upon it, but by then it was too late. The township had knowledge of this trench. They were told about it, but they did nothing to warn the public of this hazard. To this day when I drive by that area, I'm reminded of finding my son in that trench.

I don't understand how the township cannot be responsible for a known hazard on a section line. Whether they maintain them or not, it's still a public right of way. If they are told about a hazard and if they do nothing about a hazard that they know of, they have to be made accountable. My son would be here today if they would have marked the spot where the trench is. Pound a few posts in by the trench, put signs up warning the public that this section line/right of way is not safe. Or anything to warn the public of the road not being safe would have saved my son's life. The insurance company behind pushing this law should be ashamed of themselves. The townships need to take responsibility where it is due. Personally, I am shocked at how people today will try and wiggle their way out of being responsible.

My son was only 13 years old. His life was cut short due to the negligence of the township. I don't want to see this happen to anyone else. Like I said before, this was the hardest experience I have ever gone through. Please do not pass this bill, I am begging you, please do not pass it. I do not want to see anyone else endure the pain that I have gone through.

Thank you for your time,

Alfred Kappenman





BY PERSONAL DELIVERY

January 26, 2011

John M. Andrist, Chairman
Senate Political Subdivisions Committee
North Dakota Legislative Assembly
State Capitol Building
Bismarck, North Dakota

Re: SB 2161/Township Immunity

Dear Chairman Andrist and Committee Members:

First, on behalf of my clients, Julie Kappenman Tharen and Al Kappenman, let me express our thanks to you and to the Committee members for the generous time given us at the Committee's January 20, 2011 hearing in regard to SB 2161. We appreciate your courtesy and consideration.

At hearing, the Committee asked whether I might respond to NDIRF Attorney Steve Spilde's testimony with regard whether SB 2161 is analogous to immunities granted the State in N.D.C.C. 32-12.2-03(k). During testimony, it was brought up that unimproved lands owned or leased by the state are granted immunity under NDCC § 32-12.1-02(3)(k).

NDCC § 32-12.1-02(3)(k) states: "3. Neither the state nor a state employee may be held liable under this chapter for any of the following claims: (k) A claim resulting from the condition of unimproved real property owned or leased by the state." It appears that the North Dakota Supreme Court has not ruled as to the constitutionality of this statute nor has the Court interpreted its meaning.

Unimproved State lands may or may not include Congressionally-mandated section lines which are open for public travel. The right of the public to travel over section lines has never been surrendered. *Small v. Burleigh County*, 225 N.W. 2d. 295 (N.D. 1974). The township remains authorized to improve, maintain and regulate the road as the extent of travel requires. *State v. Brossart*, 1997 ND 119, ¶ 24; 565 N.W. 2d. 752, (N.D. 1997). However, the township has no responsibility, in my view, to improve or maintain an unimproved section line.

Further, the Kappenman caselaw places no responsibility on a township to affirmatively identify known hazards on its unimproved section lines, road or no road. What the case does stand for, in my view, is that the township must warn travelers of a **known** danger or hazard.

Page 2
January 26, 2011
Andrist

The township need only warn our citizens of such hazards. If a township wishes to close a section for a public benefit, the township can do so under the procedures set forth in our state law. In my view, a township need not worry about the condition of miles of unimproved section lines, which most of our rural townships have. However, the law and common sense dictate that if a township knows of a known hazard, it has to warn travelers of the hazard.

In my view, SB 2161 would grant immunity to township officers who do not act when there is a known danger present on a section line. Albion Township's failure to warn travelers of the trench in which Brason Kappenman was killed was the basis for Brason's claim, not that the trench simply existed on a section line. There was a known hazard (a large trench) across the section line and the township did nothing about it after it had been told on several occasions of the hazard. Township officers should not be granted immunity for their failure to warn people of known hazards.

Thank you for the opportunity to provide comments in this matter.

Sincerely,

DAVID R. BLISS
DRB:

cc: Committee members
Al Kappenman
Julie Tharen

M:\Kappenman, Al & Julie 27-04\Dave's memo 1-26-11.docx

SENATE BILL NO. 2161

After Proposed Amendment, Section 1 Would Remain as Introduced and Section 2 Would Read as Follows:

"A political subdivision is not liable for any claim resulting from the natural condition, including disturbances caused by travel, of a congressional section line, as described in section 24-07-03, which is unimproved or unmaintained by the political subdivision. If a political subdivision has received written notice of a man-made condition, other than disturbances caused by travel, on a congressional section line as described in section 24-07-03 that is unimproved or unmaintained by the political subdivision, it shall take steps within a reasonable time to warn of that condition."

January 24, 2011

PROPOSED AMENDMENTS TO SENATE BILL NO. 2161

Page 1, line 17, after the underscored period insert "However, any person that alters a section line has a duty to adequately warn of any danger caused by the alteration. Only the person that alters a section line may be held liable for any damages caused by the alteration. For purposes of this subsection, adequate warning includes conspicuous signage."

Renumber accordingly

#1

Testimony to the
HOUSE POLITICAL SUBDIVISIONS COMMITTEE
Prepared March 3, 2011 by the North Dakota Association of Counties
Aaron Birst, Legal Counsel

CONCERNING SENATE BILL 2161

Madam Chair and members of the committee, the North Dakota Association of Counties is here today to strongly support SB 2161 which is the result of a broad coalition of political subdivisions.

SB 2161 is an attempt to clarify responsibilities and liabilities for unimproved sections lines. As you are all aware of, North Dakota has thousands of miles of Congressional section lines which are no more than prairie trails that are in their natural state. Those section lines (every square mile) are required to remain open pursuant to both Federal and State law. Although these section lines are rarely traveled by the general public occasionally, they do carry some traffic whether it is the local farmers getting to their fields, hunters or just individuals engaging in recreational activities.

As you are also aware, there is no possible way for a political subdivision to remedy any potentially unusually dangerous conditions that may occur on these unimproved section lines. With such limited resources, political subdivisions have to focus their efforts on the roads that they currently maintain.

In 2009, the North Dakota Supreme Court placed an additional liability on all political subdivisions by holding that political subdivisions have a duty to warn the public of any unusually dangerous conditions that exist on even unimproved sections lines. This becomes problematic since how to determine an unusually dangerous condition on an unimproved section line is difficult since by their very nature of being unimproved those trails posse some inherent dangers.

Currently, the State legislature has already provided the State protection from liabilities for claims that result in injuries occurring on unimproved property owned or leased by the state in NDCC 32-12.2-02. We believe political subdivision also should be afforded some of these same protections the State is provided.

Certainly, cases where someone is seriously injured or killed is tragic and no one wants to see that happen but placing a legal duty on government where they have undertaken no action but are simply complying with Federal and State law to keep section lines open is, in our opinion, unreasonable.

For the following reasons I ask that you support Senate Bill 2161.

Thank you.

2

TESTIMONY OF GARY R. THUNE

GENERAL COUNSEL, NORTH DAKOTA INSURANCE RESERVE FUND

to the

NORTH DAKOTA HOUSE POLITICAL SUBDIVISIONS COMMITTEE

REGARDING SENATE BILL NO. 2161

March 3, 2011

Chairperson Johnson and Members of the House Political Subdivisions Committee, my name is Gary Thune - I am the General Counsel of the North Dakota Insurance Reserve Fund ("NDIRF") and appear today in support of Engrossed Senate Bill No. 2161.

The NDIRF is a self-insurance pool that currently provides liability coverage to all counties and nearly all townships in North Dakota, along with most other political subdivisions in the state.

Passage of engrossed SB 2161 would restore an orderly continuum of liability for township and county roads, where these political subdivisions would (1) continue to have duties under the law for established and maintained roads; (2) can obtain, through prescribed statutory procedures, immunity from liability for established roads that are minimally maintained; and (3) would have only specific, limited duties with regard to manmade hazards on unimproved or unmaintained congressional section lines.

SB 2161 deals, in effect, with congressional section lines that either have never been improved to an actual road or have fallen into disuse and are no longer maintained – the ubiquitous prairie trails, which more or less follow section lines but deviate around natural obstructions - that most of us have used at one time or another and that all of us should be expected to recognize as requiring extra caution because they are obviously not maintained. The bill does not address liability for congressional section lines where actual roads have been built and are regularly maintained or where they have been designated as minimum maintenance roads.

The NDIRF urges a "do-pass" recommendation for this bill because we feel it will alleviate financial burdens of increased litigation costs and the expenses of locating, purchasing, installing and maintaining appropriate signage, placed upon North Dakota political subdivisions as a result of a 2009 North Dakota Supreme Court ("Court") decision - Kappenman v. Klipfel, (2009 ND 89).

Prior to Kappenman, statutory and case law in North Dakota not only indicated that townships and counties clearly did not have a duty to maintain an improved road on every section line but also that they were not liable for injuries to persons using unimproved section lines (see, e.g., DeLair v. County of LaMoure, 326 NW2d 55 (ND 1982)).

In Kappenman, however, the Court declared that a township or county with actual knowledge of an “unusually dangerous” or “unusually hazardous” condition on an unimproved section line now has a duty to warn travelers of that condition. The practical effect of this very subjective standard is that whether a township or county had actual notice of such a condition and whether that condition met the test of “unusually dangerous” or “unusually hazardous” will likely be a fact issue in most claims, to be resolved through trial. Summary judgment, a timely and relatively efficient procedural motion to dispose of claims that are not supported by law, then becomes unlikely even to be raised in defense of a township or county in these types of claims because its chance of success is doubtful and it simply adds significantly to defense costs if denied. The difference in cost of defending a claim *to* summary judgment vs. *through* trial is dramatic, generally by a factor of at least two times.

In addition, the NDIRF is familiar, from having defended claims against townships and counties regarding road condition issues in the past, with the practical and financial difficulties these political subdivisions encounter in providing and keeping up-to-date, appropriate signs on the road network that is actually built and maintained. A newly-minted duty to deal with these expenses for unimproved or unmaintained congressional section lines, which are really nothing more than easements for the benefit of public travel unless or until an actual road is constructed thereon, is unduly burdensome. *In our view, it is not unreasonable to expect from the public that minimal degree of responsibility necessary to recognize the obvious need for caution when using these easements.*

Thank you. I would be pleased to respond to any questions the Committee may have.

In support of SB 2161

Good morning Chairperson Johnson and members of the House Political Subdivisions Committee.

I am Larry Syverson a farmer from Mayville and the Chairman of Roseville Township in Traill County. I am also the President of the North Dakota Township Officers Association.

The bill I am asking you to give your favorable report today seeks to limit the liability a political subdivision would be forced to bear for unimproved section lines. These strips of land are simply the borders of the thousands of sections that divide the land into the properties held by our land owners, mostly our taxpayers. That is the only function of these imaginary lines laid down upon the terrain. These lines and the resulting gaps in the property rights of the many land owners were drawn out to prevent the chaos that was faced when roads were being built in the states of the East. Property had to be bought from land owners for every inch of roadway, some would refuse and the roads were built around them. So a system of public easement was laid into the grid of divided properties in the developing area. These permanent easements are given the width of 33 feet on each side of that imaginary line.

Should one leave the comfort and safety of our network of improved and maintained roads in the state and head down one of these unimproved section lines you just may run headlong into the reason it was never improved. In many cases the terrain is just plain unsuitable for travel, in some cases it was recognized that it would be impossible to maintain a safe roadway so none was ever built, these lines remain unimproved.

This system of imaginary lines are by definition open for public access, however we ask how can the public expect the political subdivision to be responsible for nature? These bands of right of way are much as nature left them, unchanged since the oxcarts carried the pioneers across them. They may not be as rugged as a mountain range but those that chose to wander into them should be properly equipped with a suitable vehicle, training and caution. Very often the speed of the pioneer oxcarts was and remains prudent.

The bill stipulates that the political subdivision would be responsible in a case where man has changed that natural condition, damaged it. Provided the officers are properly notified of that damage.

Why the requirement that obstructions be reported in writing? To understand that, remember that a township officer wears many hats often having

to change his role faster than he could a hat. He is not in an office 8 to 5 weekdays with a receptionist out front. He could be anywhere doing anything when some township matter comes up. He could be coming out of the grocery store with bags in both hands when you come to tell him about the washout a couple of miles from Joe's place. By the time he can put the groceries in his pickup and find a pen that works he realizes that he doesn't have all the specifics and time will be wasted determining if it was what direction from Joe Smith or was it Olson and what did a "couple of miles" really mean? In the interest of accuracy a written notice is imperative. If it is worth tracking down a township supervisor isn't it worth jotting down a quick note?

There is no requirement for a certain form, filled out in proper order and on the desk by 5, no just a note, give us what and where, put your name on it and date it if you want to start the clock. None of this means that the problem won't be looked into or even remedied unless reported in writing, but we all have our failings, I know my memory wasn't always perfect even when my hair was a few shades darker and now I am sure it hasn't improved any since then. Did you communicate it correctly? Did I hear you right? Again if it is worth reporting it is worth a note.

The last provisions of SB2161 deal with assigning liability for damaging a section line to the party responsible for that damage and states that an order may be obtained to direct that party to repair the damage. These are not items at the discretion of the township but rather options available through a court of law. Of course having this route clearly laid out in this section may convince farm operators to respect the section line and avoid damaging it. Having the authority spelled out will also show township officers that they do have the authority and duty to get the obstruction remedied, even if it is on an unimproved section line.

The need for this bill came about when the North Dakota Supreme Court invited the Legislature to redefine subdivision liability in their decision of a case. This bill is our response to that invitation. Please allow that subdivisions can let the public enjoy these areas if they see fit to do so. Lacking this, subdivisions would have to close the unimproved section lines to all vehicular traffic, barricading them with class 3 barricades to prevent entry.

Thank you Chairperson Johnson and Committee Members, that concludes my prepared testimony this morning, again I ask that you give Senate Bill 2161 your favorable consideration. I will try to answer your questions.

Testimony from the North Dakota Township Officers Association

By Kenneth Yantes Executive Secretary

3-3-2011

Madam Chair and House Political Subdivisions Committee Members:

My name is Kenneth Yantes and I am the Executive Secretary of just under 6,000 locally elected township officers. I ask for your support for SB2161.

The decision made in the 2009 Kappenman VS Klipfel Supreme Court case has greatly increased township liability on those section lines that are unimproved and not maintained in our townships.

I hope that when you decide how you are going to vote on this bill that you will consider the thousands of miles of section lines that we have in our state.

Townships already have 56,755 miles of improved section lines that we have responsibility for. These section lines are improved; they have roads built on them and are maintained by locally elected township officers. We have the signing, weed cutting, snow removal and hazard vigilance responsibility over our road systems.

We are trying our best to keep the driving surfaces safe for the traveling public with the limited funding we have.

To require every unimproved or not maintained section line to be continually checked and signed would be a monumental task. If we are taking care of 56,755

miles of improved roads now, consider the effort required to care for all of the unimproved and not maintained section lines in our state.

I don't have the exact number of miles of unimproved and not maintained section lines but I would hazard a guess that for every one mile that is improved there maybe two or more than that are not.

If township officers have actual knowledge of a dangerous obstruction they should remove it or at the very least warn the traveling public with a warning sign.

Without actual knowledge of a dangerous condition how can they be held responsible ???

Please vote to pass SB2161 as it has the measure of common sense within it that is found in North Dakotans.

3 March 2011

Nancy Johnson, Chair
House Political Subdivisions Committee

Re: **Senate Bill 2161**

Chairperson Johnson and Committee Members:

My name is David R. Bliss and I appear today on behalf of my clients, Al Kappenman and Julie Tharen. We oppose SB 2161 as written and amended and ask this committee for a *do not pass* recommendation of the bill as it is written.

SOVEREIGN IMMUNITY DOCTRINE BANNED BY OUR SUPREME COURT.

Sovereign immunity was abolished by the North Dakota Supreme Court in the Bulman v. Hulstrand decision, 521 N.W. 2d 632 (N.D. 1994). Sovereign immunity means that "the king can do no wrong." Back in the old days, the King of England had no court above him, and he could not be sued despite any bad things he might have done to his subjects.

Our own constitution guarantees access to the courts by our citizens:

"All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct." Article 1, Section 9.

No agency or political subdivision should be above the law. As Justice Sandstrom said in his Bulman concurrence, "In America, we hold that government receives its powers from the people, not that people receive their rights from the government. This idea is embodied in our Declaration of Independence. The concept of sovereign immunity harkens back to an older idea – one inconsistent with our American democracy."

The Bulman court said that "we are aware of no public policy reasons to continue a constitutional interpretation that condones an absolute bar to tort liability...[W]e conclude that the State's sovereign immunity for tort liability is outdated and is no longer warranted."

THERE IS NO PERSUASIVE PUBLIC POLICY REASON TO ALLOW GOVERNMENTAL IMMUNITY.

- Whatever justifications initially existed for sovereign immunity, they are no longer valid in today's society.
- Few principles of modern law have been so uniformly and soundly criticized.
- Sovereign immunity from tort liability, like the governmental immunity for political subdivisions, perpetuates injustice by barring recovery for tortious conduct merely because of the status of the wrongdoer.

- Sovereign immunity contradicts the essence of tort law that liability follows negligence and that individuals and corporations are responsible for the negligence of their agents and employees acting in the course of their employment.
- The doctrine of sovereign immunity is harsh, results in injustice and is counterintuitive to any ordinary person's sense of justice.

BRASON KAPPENMAN WAS KILLED ON A SECTION LINE IN ALBION TOWNSHIP IN DICKEY COUNTY, NORTH DAKOTA.

- On August 1, 2006, Brason Kappenman was killed when the 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 and was on his way home when his tractor quit. Brason Kappenman ultimately drove on the section line and into the trench.
- The 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. The Dickey County Sheriff's Office incident report noted the washout "was hard to see until you were right on it."
- Albion Township knew about the trench but did nothing. After Brason's death, Albion Township placed a "road closed" sign on the section line.
- In June 2007, Brason's parents brought a wrongful death action against the landowner and Albion Township.

NORTH DAKOTA SUPREME COURT SAID TOWNSHIP WAS LIABLE FOR ITS FAILURE TO WARN ABOUT THE DANGEROUS CONDITION

Kappenman v. Klipfel

- In *Kappenman v. Klipfel*, the North Dakota Supreme Court stated, "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."
- "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."
- Although Albion Township stressed its "small budget," it acknowledged that it may not have cost much for the township to dump some gravel or place some flags on the section line at issue.

**TOWNSHIPS SHOULD BE HELD ACCOUNTABLE LIKE OTHER BRANCHES OF
GOVERNMENT**

- Townships should be liable for the torts they commit.
- Brason Kappenman died because of the township's refusal to warn of a known hazard of which they had actual knowledge.

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I am here today to express my concerns about bill SB 2161. I understand that this bill will relieve townships of their responsibilities to section lines and I strongly disagree with it.

I grew up on a ranch and continue to ranch with my husband to this day; and I understand that section lines are not perfect and are not traveled by heavy traffic day to day. They are however, used by local farmers, ranchers, and hunters. The point of my testimony today is not to infer that townships should stick a lot of money and time into section lines to make them perfect or that they should even be responsible for hazards that they are unaware of. But I do believe, however, that townships should be responsible for the known hazards to them that could potentially cause injury to person or worse be fatal.

My family and I have experienced the tragedy of what can happen because of the ignorance of a township and the lack of taking responsibility. On August 1, 2006 I was at home waiting for my brother, Brason Kappenman, to come home from the field. He had called me to let me know that the tractor had broken down and he was going to come home. He was only a couple miles from home, so he was using the 4-wheeler as his way of getting home. I continued to make supper and was busy packing for a trip I was about to leave on the next day.

About an hour went by and I still had not seen Brason come home or heard from him. I started to worry about him and tried several times to call his cell phone, only to get his voicemail. I then decided to call my dad, Al Kappenman, to let him know Brason was not home from the field yet and I

wondered if he had heard from him. My dad wasn't far from home so he went out to the field to see if Brason was still out there or see if he would maybe meet Brason along the way. I stayed at home finishing supper and never expecting the phone call I would get next.

My cell phone rang and I answered it thinking my dad had finally heard from Brason. What I heard on the other end of the line was pure panic and horror. My dad only said to me "Jaz I found Brason you need to come quick." He quickly gave me directions out to the section line where he had found Brason. I am CPR and first aid certified so I of course immediately responded and was thinking rapidly on the way out to where he was about all of my training and what I needed to remember. My husband, who was my boyfriend at the time, drove us out there. We started down the section line my dad described. All of a sudden we hit a trench with the pickup. We flew in the air and we later found out that it actually did some damage to his pickup. That trench however, was nothing compared to the one we would see next. We came on the scene and all I could see was my dad standing in a 4 ft. x 4ft. trench. I couldn't even see Brason or the 4-wheeler. I ran over and there was Brason, at the bottom of the massive trench covered in dirt. He had come upon the trench and not only was it not visible until you were right on it; it was also unavoidable if you had no idea it wasn't there. There wasn't even a sign to warn travelers.

There was not a scratch on him to my surprise, but that did not mean his injuries were not severe. I ran to his side and started to look him over. I asked him questions about what hurt. All he kept saying was that his legs were tired,

his stomach was sore, and he wanted water. I didn't understand it then, but the reason for his symptoms was because he was bleeding internally and had been for a while. When he hit the 4 foot by 4 foot trench, he was thrown forward and his abdomen hit the handle bars of the 4-wheeler. This caused his internal bleeding. He had been laying in the trench with his cell phone just out of reach for somewhere close to 2 hours before my dad found him.

The moment the first responders got on the scene, I stared into my brothers eyes for the last time. They quickly searched over his body also and found the massive bruising on his abdomen, indicating the internal bleeding. Right there in front of me, my brother stopped responding and I heard them say they "lost it." What they were referring to was his pulse and they immediately begin CPR. CPR on TV and watching CPR being performed on your little brother in the middle of a field are two completely different things. They couldn't waste any more time and the care-flight helicopter had to meet them on the highway, instead of in the field, to airlift him to Aberdeen. Brason was given as much help and blood as the doctors could give but he never woke up again. On August 2, 2006 my 13 year old little brother passed away from the severity of his injuries caused by the accident.

The thing that I wondered about the most was how there was this big of a hazard, and nothing was done about it. Did this really go unnoticed? Later, when I came to find out that indeed Albion Township knew of this hazard for years and had not even bothered to mark it, I was horrified. I do believe in God and his plan for everyone on this Earth, but it is hard to not think about what the

outcome of that day for my little brother would have been if there was even a simple flag in the ground. Why should this type of problem not be at the responsibility of the township, especially a known hazard that everyone was aware of on that board?

These people are put on these township boards for a reason and they need to step up to their responsibilities and do their job. Several people had informed the township of the spot that my brother eventually lost his life too. It wasn't until after my brother died, that anyone bothered to go out there and put up some type of warning. And in this case what was the cost? The cost after the fact, was some money for a sign, a few flags, someone's time, and my little 13 year old brother's life. In the end wouldn't have it been a lot easier for the township to take the small action of putting up flags and yes maybe take up 15 minutes of their time?

I'm not asking for perfect section lines with a lot of money stuck into them or even for townships to be responsible for hazards that they know nothing about. I'm asking you to consider that if township members don't do their job and take responsibility for known hazards, who will? Does the cost of a few flags or maybe even sign really take precedence over the injury or possibly death of someone's loved one?

If not for the lack of responsibility and the complete ignorance of the Albion township, my little brother, Brason, would have celebrated his 18th birthday yesterday (March 2, 2011) and we would be celebrating our March birthdays together. He would be going to his Senior Prom in a month and a half.

He would be walking down the center of the gym, soaking up his High School Graduation in May. Instead, the class of 2011 will be doing all of those things without their beloved friend and classmate.

There needs to be a responsibly somewhere. If the biggest push for this bill is because of the cost if a township gets sued; maybe the insurance companies should be pushing their townships to do their jobs and be responsible for the problems they are aware of. These people should also step back and realize that families like mine, lost something much bigger than money, we lost a loved one. I lost my one and only sibling. That to me is much bigger than money.

I kindly thank you for taking the time to listen to my testimony and consider my opinion on NOT passing bill SB 2161.

Testimony of Al Kappenman – March 3, 2011

House Political Subdivisions Committee

Chairperson Johnson and Committee Members:

My name is Alfred Kappenman, from Ellendale, ND. I lost my son, Brason Kappenman, due to the township not taking responsibility for fixing a trench in a section line after they had notice of it.. This is by far the hardest experience in my life. It has been over four years since his passing and there isn't a day that goes by that I don't think of him. He was out for a ride, enjoying the country side when he came across an unmarked trench. You could not see the trench until you came upon it, but by then it was too late. The township had knowledge of this trench. They were told about it, but they did nothing to warn the public of this hazard. To this day when I drive by that area, I'm reminded of finding my son in that trench. The sheriff's department said you could not see the trench till you came upon it. My son was a very cautious driver weather it was a tractor or a four wheeler. There was no way he or anybody else could have seen that trench.

I as a land owner, I have to carry liability insurance in case someone gets hurt on my land. For example: if I allow somebody on my land to help with the work and they get hurt do to a hazard I'm accountable. My insurance company has to pay. If I allow somebody to hunt on my land and they get hurt due to a hazard that I know of and did nothing to warn them, I'm responsible. Why should the township be any different? They are a land owner so to speak. It would take about half a day for the township officials to drive the section lines and mark hazards in Albion township. In this day and age no farmer is going to go home and write up a notice of a hazard. Every farmer carries a cell phone and they will make a call before they will right up a notice. I have had townships contact me and ask what they can do to avoid a tragedy like my sons. I told them all the same thing, go drive and mark a hazard. They all agreed with me. It's the responsible thing to do. I don't understand how the township cannot be responsible for a known hazard on a section line. Whether they maintain them or not, it's still a public right of way. If they know about a hazard and if they do nothing, they have to be made accountable. My son would be here today if they would have marked the spot where the trench is. Pound a few posts in by the trench, put signs up warning the public that this section line/right of way is not safe. Or anything to warn the public of the road not being safe would have saved my son's life. The insurance company behind pushing this law should be ashamed of themselves. The townships need to take responsibility where it is due. Personally, I am shocked at how people today will try and wiggle their way out of being responsible.

My son was only 13 years old. My son's birthday was March 2nd, he would be eighteen and graduating with his class this year. His life was cut short due to the negligence of the township. I don't want to see this happen to anyone else. Like I said before, this was the hardest experience I have ever gone through. Please do not pass this bill, I am begging you, please do not pass it. I do not want to see anyone else endure the pain that I have gone through.

Thank you for your time,
Alfred Kappenman

Prepared for: Rep. Larry Klemin

Prepared by: Jessica Braun, Legislative Intern, House Political Subdivisions Committee

PROPOSED AMENDMENT TO SENATE BILL 2161

Page 1, line 11, remove "or"

Page 1, line 12, remove "unmaintained"

Page 1, line 18, replace "regarding" with "on"

Page 1, line 19, after "line" insert ", unless the political subdivision 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, and failed to warn travelers of that condition"

Page 1, line 20, replace "regarding" with "on"

Page 1, line 22, replace "notified in writing" with "is served with notice of the hazard by certified mail or otherwise has actual knowledge"

Page 2, line 2, after "hazard" insert "or fails to provide warning that the congressional section line has a hazardous condition,"

Page 2, line 2, after "after" insert "service of"

Page 2, remove line 3

Page 2, line 4, replace "section line has a hazardous condition" with "notice or after it has actual knowledge"

Page 2, line 5, replace "creates" with "causes or contributes to"

Page 2, line 6, replace "by altering" with "on"

Page 2, line 6, replace "is" with "may be"

Page 2, line 6, remove "any"

Page 2, line 6, remove "caused"

Page 2, line 7, remove "by the alteration"

Page 2, line 8, replace "seek" with "issue"

Page 2, line 8, replace "alters" with "causes or contributes to a hazard on"

Page 2, line 9, remove "restore the congressional section line to its original"

Page 2, line 10, replace "state" with "mitigate the hazard"

Re-number accordingly

Amendments to Engrossed Senate Bill No. 2161 version 2

SECTION 1. AMENDMENT. Section 24-06-31 of the North Dakota Century Code is amended and reenacted as follows:

24-06-31. Obstructions in highway.

Each overseer of highways having ~~personal~~actual 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.

Highway or public street does not mean a congressional section line, as described in section 24-07-03, which is unimproved.

SECTION 2. Subsection 7 to section 32-12.1-03 of the North Dakota Century Code is created and enacted as follows:

7. a. With regard to a congressional section line, as described in section 24 - 07 - 03 ,which is unimproved, the political subdivision that has jurisdiction over that congressional section line:

- (1) Is not liable for any claim based on a naturally occurring hazard on that congressional section line, unless the political subdivision 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, and failed to warn travelers of that condition; and
- (2) Is not liable for any claim based on a manmade hazard on

that congressional section line unless:

(a) The political subdivision is served with notice of the hazard by certified mail or otherwise has actual knowledge that the hazard exists;

and

(b) The political subdivision either fails to take action to mitigate the hazard or fails to provide warning that the congressional section line has a hazardous condition, as soon as is practicable, but not to exceed ten days after service of the notice or after it has actual knowledge,

b. Except as provided in paragraph 2 of subdivision a, any person that causes or contributes to a hazard on a congressional section line may be liable for damages.

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

Olafson, Curtis

From: Spilde, Steve [Steve.Spilde@ndirf.com]
Sent: Thursday, April 14, 2011 5:37 PM
To: Olafson, Curtis
Subject: RE: SB 2161 Amendments

Senator Olafson: "Certified mail" is so far superior to "written notice" because, as you know, certified mail is self-proving and, therefore, lends itself to summary judgment. If the letter/notice can't be produced and there is no copy with receipt, that is pretty much that. "Written notice" is easily capable of becoming a he said/she said type of factual dispute, as to whether or when it was sent or received, that would likely survive a summary judgment motion.

It would be best to hang tough with the certified mail standard if possible, but perhaps we could live with wording along the lines of "The political subdivision is served with written notice that is either in its possession or verified by receipt;" -- largely the same as certified mail, I know, but it would be a concession in the sense that a written notice couldn't be ignored, if received, simply because it wasn't sent by certified mail.

It would be pretty difficult to have given up immunity for naturally occurring hazards and have a simple written notice standard for both natural and manmade hazards. I note the conference committee is back on for 10:30 A.M. tomorrow. If you'd like, I'd be happy to come over earlier to visit about this at your convenience. Thanks.

Steve

From: Olafson, Curtis [mailto:colafson@nd.gov]
Sent: Thursday, April 14, 2011 4:28 PM
To: Spilde, Steve
Subject: RE: SB 2161 Amendments

Steve,
I spoke to Koppelman, and he thought the House would accept that definition. It sounds like they will still be hung up the certified mail and might want "written notice" instead. Can we live with that?
CO

From: Spilde, Steve [mailto:Steve.Spilde@ndirf.com]
Sent: Thursday, April 14, 2011 12:47 PM
To: Olafson, Curtis
Subject: SB 2161 Amendments

Senator Olafson:

I have attached two versions (2 pages each) of possible amendments to SB 2161, based on our discussion after the conference this morning, adding more definition to the terms "unusually hazardous or unusually dangerous". The attachment denoted "R" shows the new language in red font, for your convenience; the attachment denoted "B" shows the same new language in black font.

As you can see, what I've done is basically use language from the Supreme Court's definition of "unusually hazardous or unusually dangerous" in the Kappenman decision with the exception of using the term "due" care instead of "ordinary" care; and using the term "congressional section line" instead of "road". The reasons for these changes are that I believe using "due" care more closely ties the concepts discussed this morning of individual responsibility and assumption of risk to a user of an unimproved congressional section line than does "ordinary" care; and that using the term "road" inaccurately exalts a "congressional section line".

Proposed Amendments to Section 2 of the First Engrossment (with House Amendments) of Engrossed
Senate Bill No. 2161 (11.0403.03000)

Page 1, line 17, after "a" remove "naturally occurring hazard" and insert "condition"

Page 1, line 18, after "unless" add ":", and remove "the political subdivision had actual"

Page 1, remove lines 19 through 21

Page 1, line 22, remove "travelers of that condition; and"; add "(a) The political subdivision is served with notice of the condition by certified mail; and (b) The condition is unusually hazardous or unusually dangerous, meaning, in the context of this subsection, it is so peculiarly dangerous there is substantial risk that a person exercising due care and driving within the limits of the law could not drive on that part of the congressional section line safely; and (c) The political subdivision either fails to take action to mitigate the condition, or fails to order mitigation of the condition, or fails to provide warning that the congressional section line has a hazardous condition, as soon as is practicable, but not to exceed ten days after service of the notice."

Page 1, remove lines 23 and 24

Page 2, remove lines 1 through 7

Page 2, line 8, after "in" remove "paragraph 2 of"

Page 2, line 9, after "contributes to" remove "a hazard" and add "an unusually hazardous or unusually dangerous condition"

Page 2, line 12, after "contributes to" remove "a hazard" and add "an unusually dangerous or unusually hazardous condition"; after "the" remove "hazard" and add "condition"

**FIRST ENGROSSMENT
with House Amendments
ENGROSSED SENATE BILL NO. 2161**

Introduced by

Senators G. Lee, Hogue, Nething

Representatives Weisz, Hofstad, D. Johnson

1 A BILL for an Act to create and enact subsection 7 to section 32-12.1-03 of the North Dakota
2 Century Code, relating to political subdivision liability; and to amend and reenact section
3 24-06-31 of the North Dakota Century Code, relating to obstructions in highways.

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

5 **SECTION 1. AMENDMENT.** Section 24-06-31 of the North Dakota Century Code is
6 amended and reenacted as follows:

7 **24-06-31. Obstructions in highway.**

8 Each overseer of highways having ~~personal~~actual knowledge, or on being notified in writing,
9 of any obstruction in the highway or public street in the overseer's district immediately shall
10 remove or cause any such obstruction to be removed. Highway or public street does not mean
11 a congressional section line, as described in section 24-07-03, which is unimproved.

12 **SECTION 2.** Subsection 7 to section 32-12.1-03 of the North Dakota Century Code is
13 created and enacted as follows:

14 7. a. With regard to a congressional section line, as described in section 24-07-03,
15 which is unimproved, the political subdivision that has jurisdiction over that
16 congressional section line:

17 (1) Is not liable for any claim based on a naturally occurring hazard on that
18 congressional section line, unless the political subdivision had actual
19 knowledge of an unusually dangerous or unusually hazardous condition that
20 a traveler would not reasonably expect to exist due to the nature of the
21 surrounding topography or geological environment and failed to warn
22 travelers of that condition; and

23 (2) Is not liable for any claim based on a manmade hazard on that
24 congressional section line unless:

*replace
Article 2 p. 2*

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- (a) The political subdivision is served with notice of the hazard by certified mail or otherwise has actual knowledge that the hazard exists; and
- (b) The political subdivision either fails to take action to mitigate the hazard or fails to provide warning that the congressional section line has a hazardous condition as soon as is practicable, but not to exceed ten days, after service of the notice or after the political subdivision has actual knowledge.
- b. Except as provided in paragraph 2 of subdivision a, any person that causes or contributes to a hazard on a congressional section line may be liable for damages.
- c. The political subdivision may issue an order directing the person that causes or contributes to a hazard on a congressional section line to mitigate the hazard.

Proposed Amendments to Section 2 of the First Engrossment (with House Amendments) of Engrossed
Senate Bill No. 2161 (11.0403.03000)

Amend accepted
↳ house receipt
↓

Page 1, line 17, after "a" remove "naturally occurring hazard" and insert "condition"

Page 1, line 18, after "unless" add ":" and remove "the political subdivision had actual"

Page 1, remove lines 19 through 21

Page 1, line 22, remove "travelers of that condition; and"; add "(a) The political subdivision is served with written notice that is either in its possession or verified by receipt; and (b) The condition is unusually hazardous or unusually dangerous, meaning, in the context of this subsection, it is so peculiarly dangerous there is substantial risk that a person exercising due care and driving within the limits of the law could not drive on that part of the congressional section line safely; and (c) If the condition is naturally-occurring, it has occurred within thirty days prior to the written notice provided for in subsection (a); and (d) The political subdivision either fails to take action to mitigate the condition, or fails to order mitigation of the condition, or fails to provide warning that the congressional section line has a hazardous condition, as soon as is practicable, but not to exceed ten days after service of the notice."

or substantially worsened
via provided for in subsection (c) below
as provided for in subsection (c) below

Page 1, remove lines 23 and 24

Page 2, remove lines 1 through 7

Page 2, line 8, after "in" remove "paragraph 2 of"

Page 2, line 9, after "contributes to" remove "a hazard" and add "an unusually hazardous or unusually dangerous condition"

Page 2, line 12, after "contributes to" remove "a hazard" and add "an unusually dangerous or unusually hazardous condition"; after "the" remove "hazard" and add "condition"

SECTION 2 IS THEN INTENDED TO READ AS FOLLOWS:

SECTION 2. Subsection 7 to section 32-12.1-03 of the North Dakota Century Code is created and enacted as follows:

7. a. With regard to a congressional section line, as described in section 24-07-03, which is unimproved, the political subdivision that has jurisdiction over that congressional section line:
 - (1) is not liable for any claim based on a condition on that congressional section line unless:
 - (a) The political subdivision is served with written notice that is either in its possession or verified by receipt; and
 - (b) The condition is unusually hazardous or unusually dangerous, meaning, in the context of this subsection, it is so peculiarly dangerous there is a substantial risk that a person exercising due care and driving within the limits of the law could not drive on that part of the congressional section line safely; and
 - (c) **If the condition is naturally-occurring, it has occurred within thirty days prior to the written notice provided for in subsection (a); and**
 - (d) The political subdivision either fails to take action to mitigate the condition, or fails to order mitigation of the condition, or fails to provide warning that the congressional section line has a hazardous condition, as soon as is practicable, but not to exceed ten days after service of the notice.
 - b. Except as provided in subdivision a, any person that causes or contributes to an unusually hazardous or unusually dangerous condition on a congressional section line may be liable for damages.
 - c. The political subdivision may issue an order directing the person that causes or contributes to an unusually hazardous or unusually dangerous condition on a congressional section line to mitigate the condition.