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From:  
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### Principles of Inherent Risk

It is worth noting that the majority of states do not have inherent risk type legislation. The reason for this is that the common law created the inherent risk doctrine and current case law, from studied courts, perpetuates the doctrine quite nicely. As you will, or should recognize, there are four essential legal elements to establishing a cause of action for negligence. These elements include duty, breach, causation and damage. The general common law dictates that recreation providers have no duty to protect participants from the inherent risks of recreational activities, and therefore no corresponding liability to participants for injury or loss resulting from those inherent risks. If the inherent risk doctrine establishes that there is no duty present in an inherent risk type situation, a participant will not be able to make out the first element of a cause of action for negligence.

The primary assumption of risk doctrine, often referred to as the "inherent risk doctrine," provides generally that individual participants assume the inherent risks of recreational activities and all liability or responsibility for injuries resulting from those risks. Put another way, providers of recreational activities have no duty, ergo no responsibility, to protect participants from the inherent risks and dangers of recreational activities. What the principle of inherent risk specifically says is that, "[o]ne who takes part in such a sport accepts the dangers so far as they are obvious and necessary." Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 791 (D. Vt. 1951). See also, Moore v. Hartley Motors, Inc., 36 P.3d 628, 633 (Alaska 2001) holding that, a risk/danger will not be considered inherent to the sport if it could be "...eliminated or mitigated through the exercise of reasonable care." Moore v. Hartley Motors, Inc., 36 P.3d at 633. In other words, the current common law relieves recreation providers from any "duty" to protect participants from the inherent risks of the associated activity, but allows participants to sue if their injuries are due to non-inherent risks created through provider negligence. As such, *critics who complain that this legislation will create a safety disincentive or that operators will not have to maintain their equipment or otherwise be safety conscious, are simply wrong. If an operator could have eliminated the risk through the exercise of reasonable care, then we are not talking about an inherent risk and this defense will not apply.*

One early case in recreational liability defined the rule as follows: "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary." Wright v. Mt. Mansfield Lift, Inc., 96 F.Supp. 786, 791 (D. Vt. 1951). The Washington Supreme Court upheld the inherent risk defense when it wrote that "a defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport." Scott v. Pacific West Mountain Resort, 834 P.2d 6, 13 - 14 (Wash. 1992). *It is important to recognize that the "inherent risk" defense or theory exists under the common law because critics of the effort to codify this common law defense like to say that this is "tort reform." Codifying the inherent risk doctrine is NOT tort reform; codifying this doctrine does nothing to limit the rights of putative plaintiffs or persons who would want to sue a recreational operator and does not create anything "new" under the law.*

What is equally as important to understand or to address is the critics claim that this bill is for the

commercial operators only and is designed to protect only their interests. Quite to the contrary! In the current insurance climate, having a state such as Montana refuse to recognize any of the normal defenses available to commercial recreation operators effectively creates an environment where land administrators and insurers will not allow programs to operate. Many insurers that underwrite in the outdoor recreation areas are making it clear that, in the State of Montana, where the climate is decidedly tilted towards suing plaintiffs because of a recreational operator's inability to use prerecreational releases, the legislature's refusal to codify or recognize the inherent risk doctrine means that many common coverages will not be offered or underwritten or coverages will be exponentially higher than those in other states. Very few programs will stay in business without proper CGL (comprehensive general liability) coverages in place. In fact, most property owners or administrators of property will not allow or permit programs to operate on their properties without appropriate insurance in place. No insurance, no place to operate, no programs. As a recreation oriented and supported state, Montana should not stand by and watch this type of result. Beyond the negative impact on the businesses of the commercial operators, the most problematic impact is that the recreational opportunities enjoyed by all of Montana's citizens and visitors and the recreational programs which are so healthy for Montana's children will steadily be destroyed. If the courts do not hear from the legislators that, in Montana, the consideration of whether a recreational incident was caused by an inherent risk of the sport needs to be made by the courts, organizations such as little league, youth soccer or hockey, after school programs and individuals who volunteer their time as coaches could well decide that the risk of large legal fees in a state and climate where no defenses are available (remember, prerecreational releases are not allowed in Montana) are simply too significant to justify the existence of these programs. The result is that thousands of children will be deprived of the valuable opportunities afforded by recreational sports and organized sports. Once again, no insurance, no place to operate, no programs. Talk about contributing to the obesity of America's youth! ***To the critics that say this legislation is only for the benefit of the commercial operators, they are wrong!! This legislation is designed to protect the recreational opportunities of all of Montana's citizens and children.***