

SENATE BILL NO. 218

INTRODUCED BY D. STEINBEISSER, ARTHUN, MURPHY, LARSEN, J. PETERSON, RIPLEY, HAMLETT,
BROWN, JONES, STEWART-PEREGOY, TUTVEDT, JACKSON, OLSON, MCNUTT, SONJU, MOORE

A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING PROCEDURES FOR SAMPLING PLANTS
PROTECTED BY PATENT OR OTHER INTELLECTUAL PROPERTY LAWS; ALLOWING CONFIDENTIALITY;
REQUIRING MEDIATION OF CLAIMS INVOLVING PROTECTED PLANTS; PROVIDING AN EXCEPTION;
PROVIDING RULEMAKING AUTHORITY; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. Legislative findings -- purpose. (1) The legislature finds that:

(a) the production of diverse agricultural crops is critical to the economic stability of Montana;

(b) Montana's agricultural companies and producers strive to operate their companies and grow their
crops pursuant to generally accepted farming principles and practices;

(c) agricultural companies and producers in Montana are responsible for operating their businesses in
a cooperative manner with their neighbors;

(d) the ability of Montana's growers to continue to compete in an expanding worldwide market is
dependent upon access to a variety of crops that are resistant to diseases and pests;

(e) Montana's arid climate necessitates the development of types of crops that are drought-tolerant; and

(f) science has been a critical part of agriculture since its inception.

(2) The purpose of [sections 1 through 6] is to provide an orderly process to be followed when an
intellectual property claim related to plants arises.

NEW SECTION. Section 2. Definitions. As used in [sections 1 through 6], the following definitions
apply:

(1) "Grower" means the person responsible for planting and managing a crop on land where infringement
of an intellectual property right is suspected to have occurred.

(2) "Person" means an individual, firm, association, corporation, partnership, the state, a subdivision of
the state, or any other form of business enterprise.

1 (3) "Protected plant" means any plant part or material, including but not limited to seeds and genetic
 2 traits, that is patented by the U.S. patent and trademark office or protected under the federal Plant Variety
 3 Protection Act, 7 U.S.C. 2321, et seq., or any other intellectual property protection recognized by federal law.

4
 5 **NEW SECTION. Section 3. Suspected violations -- sampling procedures -- CONFIDENTIALITY.** (1)

6 When an intellectual property owner or that person's agent makes a claim that a grower has planted, grown, or
 7 retained seed or any other plant part from a protected plant in violation of the intellectual property rights of another
 8 person, the claimant shall:

9 (A) request permission from the grower to enter the grower's land for the purpose of sampling;

10 (B) NOTIFY THE GROWER THAT THE GROWER MAY ASK THAT THE SAMPLING BE DONE BY THE DEPARTMENT; AND

11 (C) NOTIFY THE DEPARTMENT THAT A CLAIM IS BEING MADE.

12 (2) If the grower withholds permission to enter the grower's land or refuses to be present for sampling
 13 at a reasonable time and place, the claimant may petition a court for permission to enter the grower's land and
 14 [section 4(8)] applies.

15 (3) (a) A court may grant an order allowing a claimant to enter the property if the court determines the
 16 sampling effort to be:

17 (i) minimally invasive;

18 (ii) minimally disruptive; and

19 (iii) reasonably based on information sufficient to support an inspection.

20 (b) The court may order the claimant to pay for any physical damages caused during the process of
 21 sampling.

22 (4) (a) When sampling is conducted, the grower and the claimant both have the right to be present if both
 23 the grower and the claimant have made a good faith effort to be present at a reasonable time and place.

24 (b) A department representative must be present during sampling if the department's presence is
 25 requested by either the grower or the claimant.

26 (c) The department may perform the sampling if asked to do so by the claimant OR THE GROWER. The
 27 department shall charge a fee that covers the costs of providing the sampling service. The fee may not exceed
 28 other seed-related sampling fees charged by the department.

29 (5) Costs associated with sampling must be paid by the claimant unless:

30 (a) both parties agree to a different assignment of costs through a contractual or settlement agreement;

1 or

2 (b) a different allocation is ordered through mediation or court order.

3 (6) (a) The grower or the claimant may request that an independent laboratory confirm the presence of
4 a protected plant in the samples taken. If the department took the sample, the department shall select an
5 independent and qualified laboratory to conduct the requested laboratory services.

6 (b) Costs associated with the laboratory services must be paid by the entity making the request unless:

7 (i) both parties agree to a different assignment of costs through a contractual agreement or settlement
8 agreement; or

9 (ii) a different allocation is directed through mediation or court order.

10 (7) The results of any sampling and laboratory services conducted pursuant to this section must be ~~made~~
11 ~~available~~ SENT to the grower and the claimant BY CERTIFIED MAIL WITHIN 30 DAYS.

12 (8) THE RESULTS OF ALL SAMPLING AND TESTING ARE CONFIDENTIAL UNLESS BOTH THE GROWER AND THE
13 CLAIMANT AGREE TO MAKE THEM PUBLIC.

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15 NEW SECTION. Section 4. Mediation required before judicial action. (1) Except as provided in
16 subsection (8), a claimant shall seek mediation before seeking judicial relief regarding a claim that a grower has
17 planted, grown, or retained seed or any plant part from a protected plant in violation of the intellectual property
18 rights of another person.

19 (2) The claimant shall notify the grower by certified mail and shall also advise the department of the
20 intellectual property claim.

21 (3) (a) A mediator chosen pursuant to this section must:

22 (i) be selected and agreed upon by the claimant and the grower;

23 (ii) be an attorney; and

24 (iii) possess the necessary skills and qualifications to be a mediator.

25 (b) Preference must be given to attorneys with experience in intellectual property claims.

26 (4) (a) The department shall maintain a list of qualified mediators willing to perform mediation under
27 [sections 1 through 6]. Both parties to an action may suggest names of a mediator as soon as the grower and
28 the department are notified of the claim. The parties are not limited to using mediators from the department's list.

29 (b) The parties shall exercise good faith and diligence in selection of the mediator. If the parties exercise
30 good faith and diligence and are unable to agree upon a mediator within 90 days of notice to the grower, either

1 party may seek judicial relief.

2 (5) (a) The selected mediator shall schedule mediation to begin within 30 days at a location agreeable
3 to both parties. The parties shall conclude mediation within 30 days of commencement of mediation unless the
4 parties agree to a longer mediation period.

5 (b) The parties shall share equally in the costs of the mediator and mediation unless a different
6 cost-sharing arrangement is agreed to by the parties.

7 (6) A mediation that results in agreement between the claimant and the grower must be documented by
8 the mediator and signed by an authorized representative of each party. The mediator shall retain an original copy
9 of the signed agreement. The agreement is binding upon the claimant and the grower.

10 (7) The deliberations and the outcome of the mediation may not be made public unless agreed to by the
11 grower and the claimant.

12 (8) The requirement for mediation does not apply to a claimant seeking judicial relief to conduct sampling
13 pursuant to [section 3] and may not be used to delay the ability of a claimant or grower to obtain samples. An
14 action filed to secure evidence following a grower's refusal to allow entry does not violate the mediation
15 requirements of this section.

16
17 **NEW SECTION. Section 5. Venue.** If a contract between a grower and a claimant of an intellectual
18 property right violation is silent with regard to venue for any legal proceedings regarding intellectual property
19 rights, venue must be in the district court for the district in which the alleged intellectual property right violation
20 occurred.

21
22 **NEW SECTION. Section 6. Rulemaking.** The department shall adopt rules for the purposes of
23 implementing [sections 1 through 6]. The rules must include but are not limited to:

24 (1) the procedure for requesting the department's presence during sampling;

25 (2) the fees to be charged for the department's attendance and sampling services; ~~and~~

26 (3) notification procedures related to the mandatory mediation process; AND

27 (4) A SAMPLING PROTOCOL THAT PROVIDES THAT:

28 (A) THE STANDARDS USED FOR THE FIELD SAMPLING AND LABORATORY TESTS MEET MINIMUM STANDARDS AS
29 REQUESTED BY THE CLAIMANT; AND

30 (B) SAMPLES MUST BE SUBMITTED FOR TESTING WITHIN 10 DAYS OF THE DATE OF SAMPLING.

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2 NEW SECTION. Section 7. Codification instruction. [Sections 1 through 6] are intended to be codified
3 as an integral part of Title 80, chapter 5, and the provisions of Title 80, chapter 5, apply to [sections 1 through 6].
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5 NEW SECTION. Section 8. Severability. If a part of [this act] is invalid, all valid parts that are severable
6 from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part
7 remains in effect in all valid applications that are severable from the invalid applications.
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9 NEW SECTION. Section 9. Effective date. [This act] is effective on passage and approval.
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