Liability of landowners for fences at bridge crossings

With new legislation

- Landowner liability for fencing at bridge crossings will be substantially reduced by enactment of the kind of legislation under consideration.
- Under the Recreational Use Statute, Section 70-16-302. MCA, a landowner who does not require compensation from a person recreating on their property is partially shielded from liability in two ways:
    - 1. the landowner does not have a duty of care for the condition of the property (in this case a fence to the bridge abutment) except
    - 2. for an act or omission that constitutes willful or wanton misconduct.
- The "willful or wanton misconduct" standard is the lowest level of liability, or the greatest liability shield, that is probably allowed under the Montana Constitution.
- Under the Recreational Use Statute, a landowner includes an occupier. Thus a statute that allows fences qualifies the adjacent, fencing landowner as a landowner for the purposes of the Recreational Use Statute.
- Without legislation, the adjacent, fencing landowner may not qualify to be partially shielded by the willful or wanton misconduct standard because the fence will or may not be allowed under Section 7-14-2134, MCA. This statute does not allow encroachments on road right-of-ways.
- And perhaps most importantly, there is the very significant and practical protection in the requirement of an acceptable public passage constructed by MTFWP. The fence passage will be much safer for recreationists and, therefore, substantially reduce the likelihood of an injury and, as a consequence, reduce the potential for liability.

Without new legislation

- The adjacent, fencing landowner will likely be liable for an act or omission that constitutes ordinary negligence because the landowner will not qualify as an occupant of the right-of-way.
- And, the safety of recreationists will not be enhanced by an acceptable public portage constructed by MTFWP. The risk of injury will be greater, as will the potential for liability.