



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:

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.

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.
- (3) "Protected plant" means any plant part or material, including but not limited to seeds and genetic

traits, that is patented by the U.S. patent and trademark office or protected under the federal Plant Variety Protection Act, 7 U.S.C. 2321, et seq., or any other intellectual property protection recognized by federal law.

Section 3. Suspected violations -- sampling procedures -- confidentiality. (1) When an intellectual property owner or that person's agent makes a claim that a grower has planted, grown, or retained seed or any other plant part from a protected plant in violation of the intellectual property rights of another person, the claimant shall:

- (a) request permission from the grower to enter the grower's land for the purpose of sampling;
- (b) notify the grower that the grower may ask that the sampling be done by the department; and
- (c) notify the department that a claim is being made.

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

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

- (i) minimally invasive;
- (ii) minimally disruptive; and
- (iii) reasonably based on information sufficient to support an inspection.

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

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

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

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

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

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

or

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

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

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

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

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

(7) The results of any sampling and laboratory services conducted pursuant to this section must be sent to the grower and the claimant by certified mail within 30 days.

(8) The results of all sampling and testing are confidential unless both the grower and the claimant agree to make them public.

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

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

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

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

(ii) be an attorney; and

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

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

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

(b) The parties shall exercise good faith and diligence in selection of the mediator. If the parties exercise

good faith and diligence and are unable to agree upon a mediator within 90 days of notice to the grower, either party may seek judicial relief.

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

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

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

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

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

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

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

- (1) the procedure for requesting the department's presence during sampling;
- (2) the fees to be charged for the department's attendance and sampling services;
- (3) notification procedures related to the mandatory mediation process; and
- (4) a sampling protocol that provides that:
 - (a) the standards used for the field sampling and laboratory tests meet minimum standards as requested by the claimant; and

(b) samples must be submitted for testing within 10 days of the date of sampling.

Section 7. Codification instruction. [Sections 1 through 6] are intended to be codified as an integral part of Title 80, chapter 5, and the provisions of Title 80, chapter 5, apply to [sections 1 through 6].

Section 8. Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

Section 9. Effective date. [This act] is effective on passage and approval.

- END -

I hereby certify that the within bill,
SB 0218, originated in the Senate.

Secretary of the Senate

President of the Senate

Signed this _____ day
of _____, 2011.

Speaker of the House

Signed this _____ day
of _____, 2011.

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

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.