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EXHIBIT 23 24
DATE 3.22.05
HB 560

HOUSE BILL NO. 560

INTRODUCED BY P. CLARK

A BILL FOR AN ACT ENTITLED: "~~AN ACT DESIGNATING THE FISH, WILDLIFE, AND PARKS COMMISSION AS THE AGENCY TO PROVIDE DECLARATORY RULINGS ON WHETHER A BODY OF WATER IS A STREAM SUBJECT TO THE PUBLIC'S RIGHT TO RECREATIONAL USE;~~ PROVIDING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS WITH THE ABILITY TO ABATE ARTIFICIAL HAZARDS IN STREAMS; PROVIDING EXEMPTIONS; ENSURING PUBLIC ACCESS TO STREAMS AND RIVERS ON LAND BY USE OF A BRIDGE, ITS RIGHT-OF-WAY, AND ITS ABUTMENTS; ENSURING PUBLIC ACCESS TO STREAMS BY USE OF A COUNTY ROAD RIGHT-OF-WAY; AMENDING SECTION 23-2-311, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 23-2-311, MCA, is amended to read:

"23-2-311. Right to portage -- establishment of portage route. (1) A member of the public making recreational use of surface waters may, above the ordinary high-water mark, portage around barriers in the least intrusive manner possible, avoiding damage to the landowner's land and violation of ~~his~~ the landowner's rights.

(2) A landowner may create barriers across streams for purposes of land or water management or to establish land ownership as otherwise provided by law. If a landowner erects a structure ~~which~~ that does not interfere with the public's use of the surface waters, the public may not go above the ordinary high-water mark to portage around the structure.

(3) (a) A portage route around or over a barrier may be established to avoid damage to the landowner's land and violation of ~~his~~ the landowner's rights, as well as to provide a reasonable and safe route for the recreational user of the surface waters.

(b) A portage route may be established when either a landowner or a member of the recreating public submits a request to the supervisors that ~~such~~ a route be established.

(c) Within 45 days of the receipt of a request, the supervisors shall, in consultation with the landowner and a representative of the department, examine and investigate the barrier and the adjoining land to determine a reasonable and safe portage route.

(d) Within 45 days of the examination of the site, the supervisors shall make a written finding of the most appropriate portage route.

(e) The cost of establishing the portage route around artificial barriers must be borne by the involved landowner, except for the construction of notification signs of ~~such~~ the route, which is the responsibility of the department. The cost of establishing a portage route around artificial

barriers not owned by the landowner on whose land the portage route will be placed must be borne by the department.

(f) Once the route is established, the department has the exclusive responsibility thereafter to maintain the portage route at reasonable times agreeable to the landowner. The department shall post notices on the stream of the existence of the portage route and the public's obligation to use it as the exclusive means around a barrier.

(g) If either the landowner or a recreationist disagrees with the route described in subsection (3)(e), ~~he~~ the landowner or recreationist may petition the district court to name a three-member arbitration panel. The panel must consist of an affected landowner, a member of an affected recreational group, and a member selected by the two other members of the arbitration panel. The arbitration panel may accept, reject, or modify the supervisors' finding under subsection (3)(d).

(h) The determination of the arbitration panel is binding upon the landowner and upon all parties that use the water for which the portage is provided. Costs of the arbitration panel, computed as for jurors' fees under 3-15-201, ~~shall~~ must be borne by the contesting party or parties; ~~all~~ All other parties shall bear their own costs.

(i) The determination of the arbitration panel may be appealed within 30 days to the district court.

(j) Once a portage route is established, the public shall use the portage route as the exclusive means to portage around or over the barrier.

(4) The department may investigate and determine if a fence, barrier, or other artificial obstruction located in or across a stream or body of water is a threat to public safety or property. If the fence, barrier, or other artificial obstruction is determined to be a safety hazard, the department shall request that the landowner abate the hazard. If the landowner declines, WITH THE PERMISSION OF THE LANDOWNER OR WITHOUT ENTERING PRIVATE PROPERTY, the department may abate the hazard by replacing the fence or barrier with a fence or barrier that does not threaten public safety or property and may remove or modify other artificial obstructions so that they do not threaten public safety or property. OBSTACLES RELATED TO A LICENSED HYDROELECTRIC PROJECT, IRRIGATION, OR DIVERSION OF WATER OR STRUCTURES USED FOR THE PURPOSES OF EXERCISING A WATER RIGHT ARE EXEMPT FROM THE ABATEMENT PROVISIONS OF THIS SUBSECTION.

~~(4)~~(5) Nothing contained in this part addresses the issue of natural barriers or portage around said natural barriers, and nothing contained in this part makes ~~such~~ portage around natural barriers lawful or unlawful."

NEW SECTION. Section 2. Stream access sites. (1) A member of the public may gain access to streams and rivers by using a public bridge, its right-of-way, and its abutments.

(2) A member of the public may gain access to streams and rivers by use of a county road right-of-way.

(3) A member of the public is required to stay within the road and bridge easement to gain access

to streams and rivers. Absent definition in an easement or deed to the contrary, the width of a bridge right-of-way easement is the same as the right-of-way easement for the public highway to which it is attached.

(4) Each board of county commissioners may ~~restrict or~~ condition access as necessary for public safety.

~~(5) Access to streams and rivers from a county road or bridge created by prescription is dependent upon the use of the road or bridge during the prescription period.~~

~~NEW SECTION. Section 3. Stream determination -- authority to provide declaratory rulings. The commission may, upon the request of any person or entity or upon its own determination of a need for a ruling and in accordance with the provisions in 23-2-302, make a declaratory ruling pursuant to Title 2, chapter 4, part 5, regarding a specific body of water by determining whether the body of water is:~~

~~(1) surface water capable of supporting recreational use and whether the public has the right to use the body of water for recreational use;~~

~~(2) surface water in a stock pond or other private impoundment that is fed by an intermittently flowing natural watercourse and that the public does not have the right to access for recreational use; or~~

~~(3) water that diverted away from a natural water body for beneficial use pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has provided public access, and that the public does not have the right to access for recreational use.~~

~~NEW SECTION. Section 4. Codification instruction. [Sections 2 and 3] are [Section 2] is intended to be codified as an integral part of Title 23, chapter 2, part 3, and the provisions of Title 23, chapter 2, part 3, apply to [sections 2 and 3] [section 2].~~

~~NEW SECTION. Section 5. Effective date. [This act] is effective on passage and approval.~~

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