

HOUSE BILL NO. 721

INTRODUCED BY W. STAHL

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING CERTAIN PROVISIONS RELATING TO THE RECREATIONAL USE OF STATE WATERS; CLARIFYING THAT THE PUBLIC HAS THE RIGHT TO USE THE BED AND BANKS OF SURFACE WATERS UP TO THE ORDINARY HIGH-WATER MARK FOR PURPOSES THAT ARE ESSENTIAL TO THE ENJOYMENT OF THE PUBLIC'S OWNERSHIP IN THE WATER AND THAT ARE NECESSARY TO USE OF THE WATER ITSELF, AS LONG AS THE USE IS OF MINIMAL IMPACT, AND THAT ANY USE OF REAL ESTATE THAT IS ADJOINING THE WATER IS ALLOWED WITH PERMISSION OR CONTRACTUAL ARRANGEMENT WITH THE LANDOWNER; CLARIFYING THAT THE COST OF ESTABLISHING THE PORTAGE ROUTE AROUND ARTIFICIAL BARRIERS IS NOT TO BE BORNE BY THE INVOLVED LANDOWNER; REVISING DEFINITIONS FOR CONSISTENCY; AMENDING SECTIONS 23-2-301, 23-2-302, AND 23-2-311, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, since the Montana Supreme Court decision in *Galt v. State*, 225 Mont. 142, 731 P.2d 912 (1987), state statutes outlining the public's right to use surface waters for certain recreational purposes have contained provisions that the court held to be an unconstitutional taking of private property; and

WHEREAS, Legislatures during the last 20 years have failed to clarify, remove, or modify the unconstitutional provisions, resulting in language remaining in the law that is misleading to both landowners and the recreating public; and

WHEREAS, clarifying the Montana code with regard to rights related to the recreational use of state waters, in accordance with the 1987 Supreme Court decision, is in the best interests of recreationists, landowners, and the general public.

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

Section 1. Section 23-2-301, MCA, is amended to read:

"23-2-301. Definitions. For purposes of this part, the following definitions apply:

(1) "Barrier" means an artificial obstruction located in or over a water body, restricting passage on or through the water, ~~which~~ that totally or effectively obstructs the recreational use of the surface water at the time

1 of use. A barrier may include but is not limited to a bridge or fence or any other ~~manmade~~ artificial obstacle to the
2 natural flow of water.

3 (2) "Class I waters" means surface waters, other than lakes, that:

4 (a) lie within the officially recorded federal government survey meander lines ~~thereof~~ of the surface
5 waters;

6 (b) flow over lands that have been judicially determined to be owned by the state by reason of application
7 of the federal navigability test for state streambed ownership;

8 (c) are or have been capable of supporting the following commercial activities, as these activities have
9 been defined by published judicial opinion as of April 19, 1985:

10 (i) log floating;₁

11 (ii) transportation of furs and skins;₁

12 (iii) shipping;₁

13 (iv) commercial guiding using multiperson watercraft;₁

14 (v) public transportation;₁ or

15 (vi) the transportation of merchandise, ~~as these activities have been defined by published judicial opinion~~
16 ~~as of April 19, 1985~~; or

17 (d) are or have been capable of supporting commercial activity within the meaning of the federal
18 navigability test for state streambed ownership.

19 (3) "Class II waters" means all surface waters that are not class I waters, except lakes.

20 (4) "Commission" means the fish, wildlife, and parks commission provided for in 2-15-3402.

21 (5) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.

22 (6) "Diverted away from a natural water body" means a diversion of surface water through ~~a manmade~~
23 an artificial water conveyance system, including but not limited to:

24 (a) an irrigation or drainage canal or ditch;

25 (b) an industrial, municipal, or domestic water system, excluding the lake, stream, or reservoir from which
26 the system obtains water;

27 (c) a flood control channel; or

28 (d) a hydropower inlet and discharge facility.

29 (7) "Lake" means a body of water where the surface water is retained by either natural or artificial means
30 and the natural flow of water is substantially impeded.

~~(6) "Occupied dwelling" means a building used for a human dwelling at least once a year.~~

~~(9)~~(8) "Ordinary high-water mark" means the line that water impresses on land by covering it for sufficient periods to cause physical characteristics that distinguish the area below the line from the area above it. Characteristics of the area below the line include, when appropriate, but are not limited to deprivation of the soil of substantially all terrestrial vegetation and destruction of its agricultural vegetative value. A flood plain adjacent to surface waters is not considered to lie within the surface waters' high-water marks.

~~(10)~~(9) "Recreational use" means, with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or in craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses.

~~(11)~~(10) "Supervisors" means the board of supervisors of a soil conservation district, the directors of a grazing district, or the board of county commissioners if a request pursuant to 23-2-311(3)(b) is not within the boundaries of a conservation district or if the request is refused by the board of supervisors of a soil conservation district or the directors of a grazing district.

~~(12)~~(11) "Surface water" means, for the purpose of determining the public's access for recreational use, a natural water body, its bed, and its banks up to the ordinary high-water mark."

Section 2. Section 23-2-302, MCA, is amended to read:

"23-2-302. Recreational use permitted -- limitations -- exceptions. (1) Except as provided in subsections ~~(2)~~ (3) through ~~(5)~~ (6), all surface waters that are capable of recreational use may be so used by the public without regard to the ownership of the land underlying the waters.

(2) The public has the right to use the bed and banks of surface waters up to the ordinary high-water mark for purposes that are essential to the enjoyment of the public's ownership in the water and that are necessary to use of the water itself, as long as the use is of minimal impact. Any use of real estate that is adjoining the water is allowed with permission or contractual arrangement with the landowner.

~~(2)~~(3) The right of the public to make recreational use of surface waters does not include, without permission or contractual arrangement with the landowner:

(a) the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water;

(b) the recreational use of surface waters in a stock pond or other private impoundment fed by an

1 intermittently flowing natural watercourse;

2 (c) the recreational use of waters while diverted away from a natural water body for beneficial use
3 pursuant to Title 85, chapter 2, part 2 or 3, except for impoundments or diverted waters to which the owner has
4 provided public access;

5 ~~(d) big game hunting except by long bow or shotgun when specifically authorized by the commission;~~
6 ~~—— (e) overnight camping within sight of any occupied dwelling or within 500 yards of any occupied dwelling,~~
7 ~~whichever is less;~~

8 ~~—— (f) the placement or creation of any permanent duck blind, boat moorage, or any seasonal or other~~
9 ~~objects within sight of or within 500 yards of an occupied dwelling, whichever is less; or~~

10 ~~(g)~~(d) use of a streambed as a right-of-way for any purpose when water is not flowing therein in the
11 streambed.

12 ~~(3)~~(4) The right of the public to make recreational use of class II waters does not include, without
13 permission of the landowner:

14 (a) big game hunting;

15 (b) overnight camping;

16 (c) the placement or creation of any seasonal object; or

17 (d) other activities ~~which~~ that are not primarily water-related pleasure activities as ~~defined~~ provided in
18 ~~23-2-301(10)~~ 23-2-301(9).

19 ~~(4)~~(5) The right of the public to make recreational use of surface waters does not grant any easement
20 or right to the public to enter onto or cross private property in order to use ~~such~~ surface waters for recreational
21 purposes.

22 ~~(5)~~(6) The commission shall adopt rules pursuant to 87-1-303, in the interest of public health, public
23 safety, or the protection of public and private property, governing recreational use of class I and class II waters.
24 These rules must include the following:

25 (a) the establishment of procedures by which any person may request an order from the commission:

26 (i) limiting, restricting, or prohibiting the type, incidence, or extent of recreational use of a surface water;

27 or

28 (ii) altering limitations, restrictions, or prohibitions on recreational use of a surface water imposed by the
29 commission;

30 (b) provisions requiring the issuance of written findings and a decision whenever a request is made

pursuant to the rules adopted under subsection ~~(5)(a)~~ (6)(a); and

(c) a procedure for the identification of streams within class II waters ~~which that~~ are not capable of recreational use or are capable of limited recreational use; and a procedure to restrict the recreational use to the actual capacity of the water.

~~(6)(7)~~ The provisions of this section do not affect any rights of the public with respect to state-owned lands that are school trust lands or any rights of lessees of ~~such~~ state-owned school trust lands."

Section 3. 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 portage 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, including~~ the construction of notification signs of ~~such~~ the portage 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~~ shall

1 maintain the portage route at reasonable times agreeable to the landowner. The department shall post notices
2 on the stream of the existence of the portage route and the public's obligation to use it as the exclusive means
3 around a barrier.

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

9 (h) The determination of the arbitration panel is binding upon the landowner and upon all parties that use
10 the water for which the portage is provided. Costs of the arbitration panel, computed as for jurors' fees under
11 3-15-201, ~~shall must~~ be borne by the contesting party or parties; ~~all other.~~ Other parties shall bear their own costs.

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

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

15 (4) Nothing contained in this part addresses the issue of natural barriers or portage around ~~said natural~~
16 barriers, and nothing contained in this part makes ~~such~~ portage around natural barriers lawful or unlawful."
17

18 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

19 - END -