

SENATE FISH AND GAME
EXHIBIT NO. 6
DATE 1-30-07
BILL NO. SB 78

Amendments to Senate Bill No. 78
1st Reading Copy

Requested by Senator Lane Larson

For the Senate Fish and Game Committee

Prepared by Joe Kolman
January 30, 2007 (1:49pm)

1. Title, line 4.

Strike: "REASONABLE AND SAFE"

2. Title, line 6.

Strike: "ERECTION OF"

Insert: "OPTION TO ERECT"

Following: "FENCE"

Insert: "WITH IMPROVED ACCESS"

Strike: "PUBLIC"

Insert: "COUNTY ROAD"

Following: "RIGHT-OF-WAY"

Insert: "IF THE FENCE IS ABUTTED OR ATTACHED"

3. Title, page 1, line 7.

Strike: "FENCES"

Insert: "A FENCE"

4. Title, line 8.

Strike: "PUBLIC"

Insert: "COUNTY ROAD"

Following: "RIGHT-OF-WAY"

Insert: "WHEN THE FENCE IS ABUTTED OR ATTACHED"

5. Title, line 9.

Strike: "DO NOT PROVIDE REASONABLE AND SAFE"

Insert: "PREVENT"

Following: "ACCESS TO"

Strike: "THE"

Insert: "A"

6. Title, line 11.

Following: "REPLACEMENT"

Insert: "COSTS"

Following: "CIRCUMSTANCES;"

Insert: "AUTHORIZING THE ISSUANCE OF PERMITS FOR A FENCE TO
ENCROACH IN A COUNTY ROAD RIGHT-OF-WAY; PROVIDING FOR
LANDOWNER IMMUNITY;"

7. Page 1, line 18 through page 5, line 18.

Strike: everything after the enacting clause

Insert: "NEW SECTION. Section 1. Definitions. For the purposes of [sections 1 through 3], the following definitions apply:

- (1) "Access" means access to streams and rivers for uses as provided in Title 23, chapter 2, part 3.
- (2) "Board" means the board of county commissioners.
- (3) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.
- (4) "Improved access" means the erection, repair, or replacement of a portion of a fence that provides public access to a stream or river, including but not limited to gates, stiles, polyvinyl chloride overwire, or other methods designed to enhance public access as provided in [section 3(3)].
- (5) "Legal fence" has the meaning provided in 81-4-101.
- (6) "Landowner" means the entity that holds title to the land subject to a county road right-of-way easement or the entity's lessee or agent.

(7) "Prevents public access" means a situation in which a fence allowed under [sections 1 through 3] creates a barrier or makes access to a stream or river more difficult."

Insert: "NEW SECTION. Section 2. Stream access location. (1) Subject to subsection (5), a person may gain access to a stream or river by using a county bridge, its right-of-way, and its abutments.

(2) Subject to subsection (5), a person may gain access to a stream or river by use of a county road right-of-way as described in 7-14-2112 and acquired pursuant to 7-14-2107.

(3) A person is required to stay within the road and bridge easement or right-of-way to gain access to a stream or river. Absent any 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 county road to which it is connected. The standard width of a right-of-way is provided for in 7-14-2112, and a right-of-way is acquired pursuant to 7-14-2107.

(4) The board of the county where a bridge on a county road is located may, by a reasonable exercise of the governing body's police power, condition access for purposes of public safety, but only to the extent necessary for public safety. The board may consult with the department on conditions of access.

(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.

(6) [Sections 1 through 3] may not be construed to require the county to construct or maintain areas for parking, paths, walkways, steps, ramps, or other accommodations in the county's reasonable exercise of its police power as provided in subsection (4), but the county may do so if the county chooses."

Insert: "NEW SECTION. Section 3. Fences within bridge right-

of-way easements -- legal fence requirement -- cost reimbursement -- arbitration of disputes. (1) (a) Pursuant to the provisions of subsection (1)(b), a landowner may request authorization from the board to erect, repair, or replace a legal fence in the county road right-of-way by abutting or attaching the fence to a county bridge edge, guardrail, or abutment for the purpose of controlling livestock.

(b) (i) The board may, in its discretion, issue a permit to a requesting landowner in accordance with subsection (1)(a). The permit must be recorded with the clerk and recorder of the county.

(ii) The permit issued by the board may impose reasonable conditions as long as the fence is a legal fence that does not prevent public access or provides improved access.

(c) A legal fence that is located in the county road right-of-way and that is abutted or attached to a county bridge edge, guardrail, or abutment may not prevent public access to a stream or river at the bridge, guardrail, or abutment unless and to the extent required for public safety as considered necessary by the board. The conditions of the public access must remain substantially the same as existed prior to the erection, repair, or replacement of the fence. Where necessary, this may be accomplished by improved access.

(2) (a) The board or the county road supervisor, as provided for in 7-14-2122, shall inspect a fence that is located in the county road right-of-way and that is abutted or attached to a county bridge edge, guardrail, or abutment to determine if the fence is a legal fence or if the fence prevents public access to a stream or river.

(b) If the board determines that the fence is not a legal fence or that the fence prevents public access to the stream or river, the board shall alter the fence or require the landowner, at the landowner's expense, to alter the fence within a time set by the board, not to exceed 1 year, to the satisfaction of the board.

(c) (i) If a landowner fails to alter a fence pursuant to subsection (2)(b), the board shall remove or alter the fence at the landowner's expense. If the fence prevents public access, it must be considered an encroachment pursuant to 7-14-2134.

(ii) Following notification by certified mail to the landowner at the address last shown on property tax records of the county, the landowner shall reimburse the county for the costs of removal or alteration of a fence. If the reimbursement is not made prior to July 1 of the year following the year in which the notice was received, the cost becomes a lien upon the landowner's property and, upon notification by the board of the nonpayment of the costs, the county treasurer shall collect the assessment in the same manner and at the same time as taxes for county purposes are collected.

(3) (a) The landowner is responsible for the cost of

erecting, repairing, or replacing a fence located in the county road right-of-way when the fence is abutted or attached to a county bridge edge, guardrail, or abutment.

(b) If a landowner provides improved access and adheres to the requirements of subsection (3)(c), a landowner may submit to the department a request for reasonable cost reimbursement for labor and materials for the erection, repair, or replacement of the portion of the fence that provides improved public access to the stream or river. The department is not responsible for the cost of the placement of a legal fence. The request for reimbursement must provide documentation of the costs. Upon determining that a portion of the fence provides improved access and finding the costs reasonable, the department shall reimburse the landowner exclusively for the portion of the fence that provides improved access.

(c) To be eligible for cost reimbursement, a landowner who has obtained a permit issued in accordance with subsection (1) and who provides a copy of the permit to the department must be given written authorization from the department for erecting, repairing, or replacing the portion of the fence that provides improved public access to the stream or river.

(d) The department and the county do not have financial responsibility for fence construction that was not approved pursuant to subsection (3)(c).

(4) (a) The board shall make a determination of whether a fence prevents public access based on:

(i) the board's own decision that a review is necessary and appropriate; or

(ii) the receipt by the board of a written request of the landowner, the department, or any other person.

(b) The board shall prepare a notice of the determination containing the facts pertinent to the determination and shall publish the notice once in a newspaper of general circulation in the area of the bridge and fence.

(5) The landowner, the department, or any other person may petition the district court for the county where the bridge is located to name a three-member arbitration panel, as provided in subsection (6), if the landowner, the department, or any other person disagrees with the board's determination on whether a fence prevents public access or whether the conditions of that access are impaired by the fence and files the petition within 30 days of publication of the determination.

(6) Each contesting party shall provide the names of three individuals willing to serve on an arbitration panel. The district court judge shall select the three members of the arbitration panel from those submitted by the contesting parties. The members of the arbitration panel must be residents of the county at the time of selection.

(7) (a) The arbitration panel may, by majority vote of the panel, accept, reject, or modify the determination.

(b) As part of that determination, if necessary, the arbitration panel may identify alterations that must be made to ensure that the fence is a legal fence and does not prevent public access. The arbitration panel may condition the public access to a stream or river at the county bridge edge, guardrail, or abutment, as necessary, to the extent required for public safety.

(8) The determination of the arbitration panel may be appealed to the district court within 30 days. The standards of review for an appeal are the same as for judicial review of contested cases provided for in 2-4-704.

(9) Costs of the arbitration panel, computed in the same manner as juror's fees under 3-15-201, must be borne by the petitioning party or parties. All other parties shall bear their own costs.

(10) (a) A person who makes recreational use of surface waters flowing over or through land in the possession or under the control of another pursuant to 23-2-302 is not owed a duty by a landowner, the landowner's agent, the landowner's tenant, or the county other than that provided in subsection (10) (b). A landowner, the landowner's agent, the landowner's tenant, or the county is not liable for the condition of the right-of-way providing access.

(b) A landowner, the landowner's agent, the landowner's tenant, or the county is liable to a person making recreational use of waters or land described in subsection (10) (a) only for an act or omission that constitutes willful or wanton misconduct.

(c) A landowner or any member of the arbitration panel who participates in a decision regarding whether or not a fence prevents public access in accordance with this section is not liable to any person who is injured or whose property is damaged because of use of the public access except for an act or omission that constitutes willful and wanton misconduct."

Insert: "Section 4. Section 7-14-2112, MCA, is amended to read:

"7-14-2112. Width of roads. (1) The width of all county roads, except bridges, road rights-of-way, including a right-of-way adjacent to a bridge that is part of a county road but excluding alleys, or lanes, must be 60 feet unless a greater or smaller width is ordered by the board of county commissioners on petition of an interested person.

(2) The width of all private highways and byroads byways, except bridges, must be at least 20 feet.

(3) ~~Nothing in this~~ This section shall may not be construed as increasing or decreasing the width of either kind of highway or road established or used as such prior to December 31, 1966."

{ Internal References to 7-14-2112:

7-14-2901x }

Insert: "Section 5. Section 7-14-2134, MCA, is amended to read:

"7-14-2134. Removal of highway encroachment. (1) If Except as provided in subsection (4), if any highway is encroached upon

by a fence, or building, or otherwise, the road supervisor or county surveyor of the district ~~must~~ shall give notice, orally or in writing, requiring the encroachment to be removed from the highway.

(2) If the encroachment obstructs and prevents the use of the highway for vehicles, the road supervisor or county surveyor ~~must~~ shall immediately remove the ~~same~~ encroachment.

(3) The board of county commissioners may at any time order the road supervisor or county surveyor to immediately remove any encroachment.

(4) A legal fence, as defined in 81-4-101, may be permitted in the county road right-of-way when it is abutted or attached to a county bridge edge, guardrail, or abutment for the purpose of controlling livestock if the fence does not prevent public access or if it provides improved access, as defined in [section 1], and the fence is erected following the criteria provided in [section 3]."

{Internal References to 7-14-2134: None.}"

Insert: "NEW SECTION. Section 6. {standard} Codification instruction. [Sections 1 through 3] are intended to be codified as an integral part of Title 23, chapter 2, and the provisions of Title 23, chapter 2, apply to [sections 1 through 3]."

Insert: "NEW SECTION. Section 7. {standard} Effective date. [This act] is effective on passage and approval."

- END -

Explanation -

Changes "reasonable and safe access" to public access.

Changes "public road right of way" to only county road ROW.

Gives power of permitting to county - takes away from FWP.

Provides reimbursement from FWP for "improved" public access.

Width of county rights-of-way, including next to bridge, 60 feet