

Senate Bill 405
March 22, 2011
Presented by Bob Lane
Senate Agriculture, Livestock and Irrigation Committee

Mr. Chairman, members of the Committee, I am Bob Lane, Chief Legal Counsel of the Department of Fish, Wildlife & Parks (FWP).

The FWP agrees with Senator Blewett that fences across streams or rivers can be a hazard to the safety of floaters, especially at high water when it is more difficult to avoid some fences and when the consequences can be more unforgiving.

The issue is what to do about this sometimes threat to floaters' safety. While landowners need to and have a right to control livestock on their lands with fences, recreationists have corresponding needs and rights to be protected from unsafe manmade conditions, such as a fence that is difficult to see until it is too late. The dilemma is made more complex because a fence may not be dangerous at moderate to low flows but dangerous to floaters at high flows. Flows can change rapidly in the spring with the start of runoff or in the summer with heavy rains. A fence can be safe for floaters one week and dangerous the next week.

FWP did a brief canvassing of its regions to develop an idea of the extent of the problem and to learn what effects and situations have been tried.

There are fences of different types across streams and some rivers with more fences during low waters periods when the stream or river itself is not a barrier to livestock. There were instances of close calls and accidents with barbed wire fences, electrified wires, and woven wire fences. Generally, landowners have been responsive and took down fences when told of close calls because of concern for safety and because of potential civil liability. Also, landowners have generally been cooperative with FWP in flagging fences and in allowing floats through fences. The float-through fences have consisted of a cable strung high over the stream to clear floaters with PVC pipe hung vertically from the cable to form an easy-to-part curtain. However, both barbed wire and float through PVC fences require maintenances and are vulnerable to being taken out by ice and high water. FWP personnel working with landowners, and sometimes with local groups of recreationists, have had some success with these safer fences but have not yet found perfect solutions.

However, FWP is uncertain whether this is the best solution because potential solutions have not been fully investigated and developed and because other stakeholders, particularly landowners with livestock, have not yet had a chance to voice their opinions and discuss ways to address the dilemma through legislation.

Float-through gates, fences, or cables are not always the solution because they break if the water level changes; therefore, they need continuing and frequent maintenance and adjustments. This increases the cost. The bill does not address who pays other than to put the burden on landowners.

There is a backstop for especially dangerous situations where a landowner refuses to take out or modify an unsafe fence. This is the public nuisance statute, §45-8-111, MCA. Maintaining a public nuisance is a misdemeanor that could be enforced by county sheriffs. However, FWP wardens do not have authority to enforce the public nuisance statute.

FWP opposes SB 405 because solutions that are better than the cooperation most landowners have demonstrated are not necessarily available and the cost of float-through gates, fences, and cables would be borne entirely by landowners.

Memorandum

To: Bob Lane

From: Jim Darling

Date: March 22, 2011

Subject: Summary of Regional Responses Addressing Fencing Across Streams

In the short time we had available, we received responses from Regions 2, 3, 4, 5, and 7, which are presented in outline form below:

Region 2 (Missoula)

East Branch of the Bitterroot River near Victor (10 years ago): 3 fences across the channel, 2 barbed and 1 electrified. The landowner put PVC pipe on the barbed wire and flagged the fences on his own, despite our offer to pay. He either turned off the electricity on the hot fence or put up a sign and PVC.

Blackfoot River below Stemple Pass Road bridge (2007): 2-strand barbed wire fence. We provided smooth wire for the river fence, and the landowner constructed a walk-through gate at the bridge.

Region 3 (Bozeman)

Odell Spring Creek near Ennis (2010): Barbed-wire fence erected by ranch manager for out-of-state landowner. Received much discussion online. No resolution.

Boulder River just south of Boulder (recently reported). Not yet visited.

Summary from Warden Sergeant Sam Sheppard: "I talked with my staff and have a call into Jim DeBoer to tap his 35 plus years of knowledge. Here is what I can come up with. Most if not all of our issues regarding the intent of this bill have been minor in nature and have been taken care of with a little communication and working cooperatively with the landowners. We have requested some and received some fencing adaptations or reconfigurations on the Beaverhead and Big Hole rivers. Some of the adaptations were to add safety flagging to agricultural wires for safety purposes. Landowners have also switched from barbed wire to smooth wire and electric fence to non electric fence on the East Gallatin. Some have gone so far as to provide rubber hose insulated sections to allow floaters to easily pass under any necessary fences while floating. Some of these fences are placed across certain rivers and streams late in the summer during times of low flows to prevent livestock from crossing up or down stream of the land fencing. At lower flows these temporary fences if built correctly with floater safety in mind pose minimal risk or inconvenience to the recreating public. There is anecdotal information from the Ruby river years ago about a fence that required a portage be developed or the fence removed but that remains unconfirmed at this time.

My thoughts are that at least in R3 we are adequately addressing all issues that arise currently with the tools we have on the books and there is little need for additional legislation on this matter. I fear this bill could actually create an atmosphere or situation where landowners are less tolerant and not so willing to work cooperatively on solutions.”

Region 4 (Great Falls)

Belt Creek between the Sluice Boxes and Monarch (10 years ago): Floaters were able to portage around.

Smith River (older): Several float gates have been installed in the past that didn't meet the ranchers' needs.

Smith River (recent): Barbed-wire fence with steel fence posts by Givens Gulch Boat Camp; removed. Barbed-wire fence across side channel and part of main channel between the mouth of Hound Creek and Eden Bridge; minimally marked.

Dearborn River (2006): Two canoe clubs and FWP removed barbed-wire fences and installed float gates at 3 locations. The clubs plan to install two more float gates.

Dearborn River (recent): Cable across river between high bridge and Highway 200. Dangerous at some flow levels. Unresolved – poor working relationship between landowner and FWP.

Dearborn River upstream from Highway 200 bridge (2010): Very tight, barbed-wire fence erected by landowner, cut by floaters, and restrung by landowner. Words exchanged. Unresolved.

General: Many smaller streams that are typically not floated have barbed wire across them that pose a hazard to kayakers or kick boaters. Most kayakers that undertake floats on these waters also carry wire cutters to be used as a last resort for the bottom strand.

Region 5 (Billings)

East Boulder River (1994): Fence built across the upper river. Local warden worked with landowner.

Bighorn River (2004): Electric fence across a side channel. Local warden worked with landowner.

West Rosebud Creek (2005): Hog panel hung from bridge on upper creek. Local warden worked with landowner.

Clarks Fork of the Yellowstone River (2006): Fence across upper river. Local warden worked with landowner.

Stillwater River near Nye (2006): Electric wire strung 15 inches above water. Local warden worked with landowner.

Stillwater River (2007): Barbed wire fence extended to middle of river approximately 4 miles below the Absarokee Bridge. Three-strand barbed wire between Johnson Bridge and Swinging Bridge FAS. Local warden worked with landowners. Electric wire across channel below Swinging Bridge. Fence was gone by the time the warden responded.

Yellowstone River (2008): Electric fence run from bank across a side channel to an underwater gravel bar. Local warden worked with landowner.

Musselshell River: The river is crisscrossed with fencing, especially in the upper reaches. They are difficult to navigate and some are dangerous. Currently, few anglers attempt to float the river.

General: With the increase use of smaller crafts such as kick-boats, they are concerned about more reports of conflicts in the future.

Region 7 (Miles City)

Tongue and Powder rivers: The few floaters who brave the upper reaches of these rivers encounter electric fences the most, along with some 5-strand barbed wire fences and hog panels erected at low flows.

Summary

Regional responses indicate that, on the most popular streams, new fences are reported very quickly, and FWP wardens are often able to work with landowners to provide portage or a more floater-friendly fence. In some cases, the landowner has willingly paid for those changes. Some of the infrequently floated rivers, like the Musselshell, Tongue, and Powder rivers, are crisscrossed with barbed or electric fences and lack portages. These dangers have not been addressed because few recreationists attempt to float these sections.

SB 405 may be imposing onerous requirements onto landowners who may otherwise be willing to cooperate in providing more floater-friendly fencing and portage. The bill addresses the few worst-case scenarios where landowners resist solutions, floaters cut fences, and diplomacy fails.