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EXHIBIT #3
DATE Feb 2, 2015
HB #286

January 30, 2015

HB286: Prohibiting the restriction of public access on certain roads or rights-of-way used by the public unless certain requirements are met.
Introduced by: T Jacobson

This bill concerns me for numerous reasons.

The wording is very vague as to exactly what roads, easements, and/or rights-of-way this statute covers. If a piece of property has "no proven legal status" and only "appears to meet conditions necessary to qualify for a prescriptive easement or other public road designation", the bill is attempting to force the landowner to prove a negative...that the public has not used the property.

The landowner should have the right to use their property as they see fit unless proven otherwise. The burden should be on the public to prove that it has used the property.

There is no definition in this bill as to what constitutes "travel by the public". If two lots are accessed via a dead end dirt or gravel road that those two lots maintain and UPS, FedEx, the newspaper carrier, guests, etc travel the dirt road to get to the lots, of if a few people use a logging road for a few days every hunting season, does that constitute "travel by the public"?

Again, if the property has no proven legal status, how is jurisdiction to be determined? Cases such as these have historically been decided as civil matters, based on legal evidence and heard by qualified judges, not left up to County Commissioners who have no legal training.

When reading the text of this bill, I was reminded of a couple of cases in my neighborhood.

The first affected my property. While I was away in the summer of 2007, my roadside was torn up such that 30,000 pounds of rock was graded onto it, the grass was completely torn out, and a culvert crushed. It was left such that I could not spray for weeds, or mow the grass so I proceeded to rake out the rock, paid to have it hauled away, and reseeded the roadside...at my expense. I installed delineators approximately 7' from the edge of the roadbed. In response to a call, in the spring of 2008, the County road department said the posts did not pose a safety hazard and they wouldn't pursue any action. That was the last I heard from the County road department until November of 2012 when they demanded the posts be removed at once. They never gave a reason, and a civil case ensued. The road in question is a dead end, with only 5 properties accessing it. It was maintained through HOA dues, and is currently maintained through a Road Improvement District (RID) assessment. It has never been opened, established, constructed, maintained, abandoned, or discontinued in accordance with Title 7, chapter 14 as a County road (as defined in MCA 60-1-103(7)). So how does the County claim jurisdiction?

In another case, the County took over a year to have two gates removed from an easement. The clock is at about 18 months and counting on two pasture fences narrowing a 60' easement to approximately 26'.

This bill does not specify a time limit as to when a decision must be made. In the cases I've described, the County has not been pro-active in resolving these issues, but have swept them under the rug until tempers reach a boiling point.

There is nothing in this bill that allows the landowner to recover costs, such as time, attorney fees, loss of use, etc if he or she prevails in proving they have the right to install a fence, barrier, or sign.

Section 1(4) refers to MCA sections 7-14-2134 through 7-14-2138. As in the cases I've described, the County has not been prompt in dealing with complaints. If they allow suspected encroachments to exist for months or even years, they should not then have the right to demand immediate removal or fines. In the case of a fence, it is unreasonable to expect the landowner to move a fence when the ground is frozen, particularly if it has been in existence for months or years.

Lastly, Section 1(5) defines a prescriptive easement as "a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years". As written, this could be interpreted that if a road or trail was used for 5 or more years during logging, mining, or livestock movement in the distant past and is not used currently, it would have created an easement that remains today.

This bill does not provide for such an easement being abandoned and reverting to private property if not used for 5 years. The 5 year gate should swing both ways.

If the public or County wants access to property, they should follow established procedures to determine access before a landowner decides to use his property.

As written, this bill is very one sided and is designed to put undue burden and expense on landowners.

For the above reasons, I oppose this bill and urge you to vote no on it.

Thank you,
Cindy Swank
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Major opposition points:

- This bill is trying to require a landowner to prove a negative - that a piece of property has not been used for a specified time, by specified people, for a specified purpose. It should be the public's responsibility to prove that it has been used, or that a fence, barrier, or sign was intended (or did) prevent vehicular traffic.

- There is no definition for "normal vehicular travel by the public" and precisely how and where vehicular travel may occur - such as only on the prepared road surface, but not in the ditches.

- There is no definition for "public road designation" or the method(s) by which property receives such a designation. There are very specific requirements already in the statutes that describe how property becomes a county road and/or a public highway. A non-dedicated road with no proven legal status would fail those requirements.

- This bill is attempting to prevent a landowner from using his/her property until a decision is made.

- This bill is attempting to give the County Commissioners the same status as a court of law. They are not qualified to hear legal arguments and decide matters of law.

- This bill does not provide the landowner compensation for attorney's fees, costs, loss of use, etc in the event the landowner prevails.

- This bill does not provide a specified time limit to have a decision rendered.

- This bill does not provide for the return to private status if a piece of property has not been used for a period of five years.

- This bill defines a prescriptive easement as "a right to use the property of another that is acquired by open, exclusive, notorious, hostile, adverse, continuous, and uninterrupted use for a period of 5 years", but does not specify the frequency of the use (daily, seasonal, as needed, etc) and/or how many people must use the property during the 5 years.

Some relevant statutes:

MCA 60-1-103 General Definitions
(7) states a "County road means any public highway opened, established, constructed, maintained, abandoned, or discontinued by a county in accordance with Title 7, Chapter 14.
(22) "Public highways" means all streets, roads, highways, bridges, and related structures:

(a) built and maintained with appropriated funds of the United States or the state or any political subdivision of the state;

(b) dedicated to public use;

(c) acquired by eminent domain, as provided in Title 70, chapter 30, and chapter 4 of this title; or

(d) acquired by adverse use by the public, with jurisdiction having been assumed by the state or any political subdivision of the state.

MCA 60-1-201. Classification -- highways and roads.
(1) Public highways of this state are classified as follows:

(a) federal-aid highways;

(b) state highways;

(c) county roads;

(d) city streets.

(2) All highways that are not designated, selected, or established by the commission or constructed or maintained by the department may be designated as county roads or city streets upon the acceptance of the county or city.
(3) County roads are those that are opened, established, constructed, maintained, changed, abandoned, or discontinued by a county in accordance with Title 7, chapter 14, or that have been the subject of a request under 7-14-2622 and for which a legal route has been recognized by a district court as provided in 7-14-2622.

7-14-2101. General powers of county relating to roads and bridges -- definitions.

(2) Unless the context requires otherwise, for the purposes of this chapter, the following definitions apply:

(b) "County road" means:

(i) a road that is petitioned by freeholders, approved by resolution, and opened by a board of county commissioners in accordance with this title;

(ii) a road that is dedicated for public use in the county and approved by resolution by a board of county commissioners;

(iii) a road that has been acquired by eminent domain pursuant to Title 70, chapter 30, and accepted by resolution as a county road by a board of county commissioners;

(iv) a road that has been gained by the county in an exchange with the state as provided in 60-4-201; or

(v) a road that has been the subject of a request under 7-14-2622 and for which a legal route has been recognized by a district court as provided in 7-14-2622.
(3) (a) Following a public hearing, a board of county commissioners may accept by resolution a road that has not previously been considered a county road but that has been laid out, constructed, and maintained with state department of transportation or county funds.

(b) A survey is not required of an existing county road that is accepted by resolution by a board of county commissioners.

(c) A road that is abandoned by the state may be designated as a county road upon the acceptance and approval by resolution of a board of county commissioners.