

SENATE BILL NO. 78
INTRODUCED BY L. LARSON

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING FOR REASONABLE AND SAFE PUBLIC ACCESS TO STREAMS AND RIVERS FROM A COUNTY BRIDGE, ITS RIGHT-OF-WAY, AND ITS ABUTMENTS; PROVIDING FOR THE ERECTION OF A LEGAL FENCE IN THE PUBLIC RIGHT-OF-WAY TO THE BRIDGE EDGE, GUARDRAIL, OR ABUTMENT; PROVIDING FOR THE INSPECTION OF FENCES LOCATED IN A PUBLIC RIGHT-OF-WAY TO A BRIDGE EDGE, GUARDRAIL, OR ABUTMENT; PROVIDING FOR THE ALTERATION OF FENCES THAT DO NOT PROVIDE REASONABLE AND SAFE PUBLIC ACCESS TO THE STREAM OR RIVER; PROVIDING FOR REIMBURSEMENT OF FENCE ERECTION, REPAIR, OR REPLACEMENT UNDER CERTAIN CIRCUMSTANCES; PROVIDING FOR ARBITRATION THROUGH THE DISTRICT COURT IN THE EVENT OF CONFLICT; PROVIDING FOR THE COSTS OF ARBITRATION; DEFINING TERMS; AMENDING SECTIONS 7-14-2112 AND 7-14-2134, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

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

- (1) "Board" means the board of county commissioners.
- (2) "Department" means the department of fish, wildlife, and parks provided for in 2-15-3401.
- (3) "Landowner" means the entity that holds title to the land or the entity's lessee or agent.
- (4) "Reasonable and safe public access" means for a fence allowed under [sections 1 through 3] that

the fence itself does not make access to a stream or river more difficult or dangerous than access without the fence. Reasonable and safe public access must be determined by comparing the placement of the fence and any gates, stiles, or other modifications to the terrain of the right-of-way adjacent to the stream or river.

NEW SECTION. Section 2. Stream access location. (1) Subject to subsection (5), a person may gain access to streams and rivers by using a county bridge, its right-of-way, and its abutments.

(2) Subject to subsection (5), a person may gain access to streams and rivers by use of a county road right-of-way as described in 7-14-2112.

(3) A person is required to stay within the road and bridge easement or right-of-way 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 county road to which it is connected.

(4) The board of the county where a bridge on a county road is located, in consultation with the department, may condition access for public safety, but only to the extent 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. 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, as defined in 81-4-101, located in the public right-of-way to a county bridge edge, guardrail, or abutment for the purpose of controlling livestock.

(b) A legal fence that is located in the public right-of-way to a county bridge edge, guardrail, or abutment may not deny reasonable and safe public access, unless and to the extent necessary for public safety, to a stream or river at the bridge, guardrail, or abutment, and the conditions of the reasonable and safe public access must remain substantially the same as existed prior to the erection, repair, or replacement of the fence.

(2) (a) The board and the department may inspect a fence located in the public right-of-way to a county bridge edge, guardrail, or abutment to determine if the fence is a legal fence, as defined in 81-4-101, or if the fence impedes reasonable and safe public access to a stream.

(b) If the board and the department determine that the fence does not meet the definition of a legal fence or that the fence impedes reasonable and safe public access to the stream or river, the board and the department may alter the fence or require the landowner, at the landowner's expense, to alter the fence, within a time set by the board and the department, to the satisfaction of the board and the department.

(c) If a landowner fails to alter a fence pursuant to subsection (2)(b), the board and the department may remove or alter the fence at the landowner's expense. If the fence does not provide reasonable and safe public access, it must be considered an encroachment pursuant to 7-14-2134.

(3) (a) The landowner is responsible for the cost of erecting, repairing, or replacing a fence located in the public right-of-way to a county bridge edge, guardrail, or abutment.

(b) If a landowner 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 reasonable and safe public access to the waterway, including but not limited to gates, stiles, or other methods designed to ensure public access. The department is not responsible for the cost of the placement of a fence so that it does not impede reasonable and safe public access. The request for reimbursement must provide documentation of the costs. Upon finding the costs reasonable, the department shall reimburse the landowner.

(c) To be eligible for cost reimbursement, the landowner shall obtain written authorization from the department before erecting, repairing, or replacing the portion of the fence that provides reasonable and safe public access to the waterway.

(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 and the department shall make a determination of whether a fence impedes reasonable and safe public access based on:

- (i) their own decision that a review is necessary and appropriate; or
- (ii) the receipt by the board of a written request of the landowner or any other person.

(b) The department 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, a person, the department, or the board may petition the district court where the bridge is located to name a three-member arbitration panel, as provided in subsection (6), if:

(a) either the landowner or any person disagrees with the board and the department's determination on whether a fence impedes reasonable and safe public access and files the petition within 30 days of publication of the determination; or

(b) the board and the department do not agree within 120 days of the initiation of a review on whether a fence impedes reasonable and safe public access.

(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 judicial district at the time of selection.

(7) (a) The arbitration panel may, by majority vote of the panel, accept, reject, or modify the determination. If the board and the department do not agree on whether a fence impedes reasonable and safe public access, the arbitration panel shall make the determination by a majority vote.

(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 impede reasonable and safe 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, and to the extent required for public safety.

(8) The determination of the arbitration panel may be appealed within 30 days to the district court. 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 as for 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, or the landowner's tenant, other than that provided in subsection (10)(b).

(b) A landowner, the landowner's agent, or the landowner's tenant 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 impedes reasonable and safe public access is not liable to any person who is injured or whose property is damaged because of use of the reasonable and safe public access except for an act or omission that constitutes willful and wanton misconduct.

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

"7-14-2112. Width of roads. (1) (a) The width of all county roads, except bridges, 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.

(b) The width of all county bridge rights-of-way is 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, except bridges, must be at least 20 feet.

(3) Nothing in this section ~~shall~~ may 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."

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

"7-14-2134. Removal of highway encroachment. (1) ~~¶~~ Except as provided in subsection (4), if any

highway is encroached upon by fence, 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 located in the public right-of-way to a county bridge edge, guardrail, or abutment for the purpose of controlling livestock if there is reasonable and safe public access, as defined in [section 1], and the fence is erected following the criteria provided in [section 3]."

NEW SECTION. Section 6. 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].

NEW SECTION. Section 7. Effective date. [This act] is effective on passage and approval.

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