

HOUSE BILL NO. 190

INTRODUCED BY K. VAN DYK, P. BECK, COHENOUR, ESSMANN, GALLUS, JENT, MACLAREN,
O'HARA, POMNICHOWSKI, SHOCKLEY, STAHL, STEENSON, BRUEGGEMAN, BLEWETT, CAFERRO,
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A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO ACCESS TO STATE WATERS FROM COUNTY ROADS AND BRIDGES; PROVIDING THAT A FENCE ATTACHED TO OR ABUTTING A COUNTY ROAD BRIDGE IS NOT CONSIDERED AN ENCROACHMENT UNDER CERTAIN CIRCUMSTANCES; PROVIDING FOR PUBLIC ACCESS TO SURFACE WATERS FOR RECREATIONAL USE FROM A COUNTY ROAD RIGHT-OF-WAY AND FROM A COUNTY BRIDGE, ITS RIGHT-OF-WAY, AND ITS ABUTMENTS; PROVIDING FOR PUBLIC PASSAGE TO SURFACE WATERS THROUGH COUNTY ROAD AND BRIDGE RIGHTS-OF-WAY WHILE MAINTAINING LIVESTOCK CONTROL OR PROPERTY MANAGEMENT; REQUIRING THE DEPARTMENT OF FISH, WILDLIFE, AND PARKS TO NEGOTIATE WITH AFFECTED LANDOWNERS TO PROVIDE METHODS TO ENSURE PUBLIC PASSAGE TO SURFACE WATERS FOR RECREATIONAL PURPOSES WHILE MAINTAINING LIVESTOCK CONTROL OR PROPERTY MANAGEMENT; PROVIDING FOR PAYMENT OF THE COSTS OF ANY FENCE MODIFICATION NECESSARY TO PROVIDE FOR PUBLIC PASSAGE; AMENDING SECTION 7-14-2134, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

WHEREAS, the Legislature finds that significant controversy has existed related to public access to streams and rivers from county road and bridge rights-of-way; and

WHEREAS, a Montana Attorney General's Opinion in 2000 (48 A.G. Op. 13) held that the use of a county road right-of-way to gain access to streams and rivers is consistent with and reasonably incidental to the public's right to travel on county roads and that the public may gain access to streams and rivers by using the bridge, its right-of-way, and its abutments; and

WHEREAS, during the 2007-08 interim a group of stakeholders met to address the controversy and agreed in principle that a legislative solution was preferable and that past legislative attempts may have failed because they were overly complex; and

WHEREAS, the stakeholders also agreed in principle that any proposed legislation needed to provide:

(1) that a fence in a county road right-of-way abutting a bridge should not, ~~conditionally~~, be considered an encroachment;

(2) that the public may access streams and rivers from a county road or bridge right-of-way, but that the public must stay in the right-of-way to gain access;

~~(3) that existing rights-of-way, including prescriptive rights-of-way, should be preserved but not expanded;~~

(3) THAT THE LEGISLATION NEITHER CREATE ANY RIGHT NOR EXTINGUISH ANY RIGHT RELATED TO COUNTY ROADS ESTABLISHED BY PRESCRIPTIVE USE THAT EXIST AT THE TIME OF PASSAGE;

(4) a process to define the physical characteristics of a fence used for public access in county road and bridge rights-of-way; and

(5) an approach with broad scope rather than an attempt to resolve a myriad of possible contingencies; and

WHEREAS, the stakeholders determined that each of these provisions was integral to the others and that if any section of the proposed legislation containing the agreed-upon principles was removed, the entire legislation should be void.

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

Section 1. Section 7-14-2134, MCA, is amended to read:

"7-14-2134. Removal of highway encroachment. (1) ~~If~~ Except as provided in subsection (4) and as clarified in [sections 2 and 3], if any highway is encroached upon by fence, building, or otherwise, the road supervisor or county surveyor of the district must 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) This section does not apply to a fence FOR LIVESTOCK CONTROL OR PROPERTY MANAGEMENT that is in a county road right-of-way and that is attached to or abuts a county road bridge edge, guardrail, or abutment if the fence and bridge appurtenances are not on the roadway, as defined in 61-1-101. Any fence described in this subsection must comply with [section 3]."

NEW SECTION. Section 2. Access to surface waters by public bridge or county road right-of-way.

(1) A person may gain access to surface waters for recreational use by using:

- (a) a public bridge, its right-of-way, and its abutments; and
- (b) a county road right-of-way.

(2) When accessing surface waters pursuant to subsection (1), a person shall stay within the road or bridge right-of-way. Absent definition in an easement or deed to the contrary, the width of a bridge right-of-way is the same width as the right-of-way of the road to which the bridge is attached.

(3) THE PROVISIONS IN [SECTIONS 1 AND 3] AND THIS SECTION RELATED TO PUBLIC ACCESS TO SURFACE WATERS FOR RECREATIONAL USE NEITHER CREATE NOR EXTINGUISH ANY RIGHT RELATED TO COUNTY ROADS ESTABLISHED BY PRESCRIPTIVE USE THAT EXIST ON [THE EFFECTIVE DATE OF THIS ACT].

(4) FOR PURPOSES OF DETERMINING LIABILITY, A PERSON ACCESSING SURFACE WATERS FOR RECREATIONAL USE PURSUANT TO THIS SECTION IS OWED NO DUTY BY A LANDOWNER OR AN AGENT OR TENANT OF THAT LANDOWNER OTHER THAN FOR AN ACT OR OMISSION THAT CONSTITUTES WILLFUL OR WANTON MISCONDUCT.

NEW SECTION. Section 3. Fencing for livestock control and public passage -- negotiation -- costs. (1) Each AT COUNTY ROAD BRIDGES FOR WHICH PUBLIC ACCESS IS AUTHORIZED PURSUANT TO [SECTION 2], EACH fence attached to or abutting a county road bridge edge, guardrail, or abutment for livestock control OR FOR PROPERTY MANAGEMENT pursuant to 7-14-2134(4) must provide for public passage to surface waters for recreational use pursuant to this section.

(2) (a) If a dispute arises regarding public passage pursuant to subsection (1), the department, pursuant to the department's policy in 87-1-229 to work with private land managers to resolve and reduce user conflicts, shall negotiate with the affected landowner regarding the characteristics of AN ACCESS FEATURE OF a legal fence for public passage and livestock control OR PROPERTY MANAGEMENT. Examples of AN ACCESS FEATURE OF a legal fence that provides public passage and livestock control OR PROPERTY MANAGEMENT may include:

~~(i) PVC overwire;~~

~~(ii)(I) a stile;~~

~~(iii)(II) a gate;~~

~~(iv)(III) a roller;~~

~~(v)(IV) a walkover; or~~

(V) A WOODEN RAIL FENCE THAT PROVIDES FOR PASSAGE; OR

~~(vi)(V)(VI) any other method designed for public passage and livestock control OR PROPERTY MANAGEMENT.~~

(B) IT MAY ONLY BE NECESSARY TO LOCATE ONE ACCESS FEATURE ON EACH SIDE OF THE SURFACE WATER. ONE ACCESS FEATURE, AS DESCRIBED IN SUBSECTION (2)(A), ON EACH SIDE OF THE STREAM IS SUFFICIENT. WHEN

PRACTICABLE, ONE ACCESS FEATURE MUST BE LOCATED ON THE DOWNSTREAM BRIDGE EDGE, GUARDRAIL, OR ABUTMENT.
THE DEPARTMENT MAY WAIVE THESE PROVISIONS WHEN ONE ACCESS FEATURE IS SUFFICIENT.

~~(b)(c)~~ If the landowner and the department cannot reach agreement within 60 days after the department's initial contact with the landowner for negotiation, the department shall provide the landowner with options for methods to provide public passage while controlling livestock OR MANAGING PROPERTY. If the landowner does not choose one of the method options within 30 days after the options are offered, the department shall choose and then may install one of the method options.

(3) The department, in cooperation with other interested parties, shall provide the materials, installation, and maintenance of any fence modifications necessary to provide public passage as required by this section.

~~(4) Once a legal fence is installed pursuant to this section, the landowner is entitled to the exemption from liability in 70-16-302(1).~~

NEW SECTION. Section 4. Codification instruction. [Sections 2 and 3] are intended to be codified as an integral part of Title 23, chapter 2, part 3, and the provisions of Title 23, chapter 2, part 3, apply to [sections 2 and 3].

NEW SECTION. Section 5. Nonseverability. It is the intent of the legislature that each part of [this act] is essentially dependent upon every other part, and if one part is held unconstitutional or invalid, all other parts are invalid.

NEW SECTION. Section 6. Effective date. [This act] is effective on passage and approval.

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