

FISH AND WILDLIFE - Use of surface waters for trapping and snowmobiling;

TRESPASS - Use of surface waters for trapping and snowmobiling;

WATER AND WATERWAYS - Use of surface waters for trapping and snowmobiling;

MONTANA CODE ANNOTATED - Sections 23-2-601 to 23-2-644, 45-6-201 to 45-6-203, 87-2-101(4), 87-2-601 to 87-2-604, 87-3-126;

MONTANA LAWS OF 1985 - Chapter 556, sections 1, 2; chapter 599, section 1.

HELD: 1. Landowner permission is required before snowmobiling on the frozen surfaces of state waters between the ordinary high-water marks.

2. The "Stream Access Bill," 1985 Mont. Laws, ch. 556, does not apply to the trapping of fur-bearing animals. Rather, the State's criminal trespass statutes apply, making the right to trap fur-bearing animals between ordinary high-water marks dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon the land and whether a license to trap has been secured.

15 November 1985

James W. Flynn, Director
Department of Fish, Wildlife,
and Parks
1420 East Sixth Avenue
Helena MT 59620

Dear Mr. Flynn:

You have requested my opinion on the following two questions:

1. Is landowner permission required for snowmobiling on the frozen surfaces of state waters between the ordinary high-water marks?
2. Is landowner permission required for the trapping of fur-bearing animals between the ordinary high-water marks of state waters?

Your inquiry arises from the passage of House Bill 265 during the 1985 Legislative Session. House Bill 265 (1985 Mont. Laws, ch. 556), popularly known as the Stream Access Bill, addressed the rights of parties to make recreational use of the State's surface waters. Surface waters, defined as bodies of water, their beds, and their banks up to the ordinary high-water marks, are divided into two classes of water, which include all bodies of water with the exception of lakes. For purposes of this opinion, the distinctions between Class I and Class II waters are unimportant.

Section 2(1) of chapter 556 permits all surface waters that are capable of recreational use to be so used by the public without regard to ownership of the underlying land, with certain enumerated exceptions where landowner permission is necessary before recreational use of the waters may be made. Section 2(2)(a) of chapter 556 requires permission of landowners for "the operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water." This exception is pertinent to your question concerning snowmobiling on frozen surface waters. The language of section 2(2)(a) of chapter 556 which requires landowner permission for the use of "motorized vehicles not

primarily designed for operation upon the water" clearly applies to snowmobiles. If landowner permission is granted, other statutes that regulate the ownership and operation of snowmobiles would apply. See §§ 23-2-601 to 644, MCA.

With respect to your question concerning the trapping of fur-bearing animals on state waters, chapter 556 does not apply. Chapter 556 deals with laws relating to "recreational use" of state waters. "Recreational use" is defined in section 1(10).

"Recreational use" means with respect to surface waters: fishing, hunting, swimming, floating in small craft or other flotation devices, boating in motorized craft unless otherwise prohibited or regulated by law, or craft propelled by oar or paddle, other water-related pleasure activities, and related unavoidable or incidental uses. [Emphasis added.]

Chapter 556 was not intended to address the commercial use of state waters, but rather the use of those waters in a manner that primarily involves water-related pleasure activities. Certain of those activities are specifically mentioned in the above-quoted definition of "recreational use"; however, other pleasure activities that are water-related are also included in the definition. The trapping of fur-bearing animals is not specifically listed as a "recreational use" of the state's waters in section 1(10) of chapter 556. Nor can it be considered as fitting within the meaning of the phrase "other water-related pleasure activities." Fur-bearing animals include marten or sable, otter, muskrat, fisher, mink, bobcat, lynx, wolverine, northern swift fox, and beaver. § 87-2-101(4), MCA. The trapping of such animals is considered a commercial activity, subject to certain licensing requirements. Because the trapping of fur-bearing animals is not considered a recreational activity, chapter 556 is inapplicable in determining the necessity of landowner permission when trapping on state waters.

Those statutes which do apply to the trapping of fur-bearing animals include the criminal trespass statutes, §§ 45-6-201 to 203, MCA, as amended by 1985 Montana Laws, chapter 599. The criminal trespass

statutes make it a crime to enter premises (including real estate) without license, invitation, or privilege.

Privilege to enter or remain upon land is extended either by the explicit permission of the landowner or other authorized person or by the failure of the landowner or other authorized person to post notice denying entry onto private land. Such privilege may be revoked at any time by personal communication of notice by the landowner or other authorized person to the entering person.

§ 45-6-201, MCA, as amended by 1985 Mont. Laws, ch. 599, § 1. In addition to compliance with the trespass laws, the trapper of fur-bearing animals must also, of course, secure a license to trap under section 87-2-601 to 604, MCA. Other restrictions on trapping are found in Title 87, including a prohibition against the use of boats. § 87-3-126, MCA.

THEREFORE, IT IS MY OPINION:

1. Landowner permission is required before snowmobiling on the frozen surfaces of state waters between the ordinary high-water marks.
2. The "Stream Access Bill," 1985 Mont. Laws, ch. 556, does not apply to the trapping of fur-bearing animals. Rather, the State's criminal trespass statutes apply, making the right to trap fur-bearing animals between ordinary high-water marks dependent upon whether the trapper has license, invitation, or privilege to enter or remain upon the land and whether a license to trap has been secured.

Very truly yours,

MIKE GREELY
Attorney General