

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 25, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order at 7:00 a.m. in Room 312-3 of the State Capitol.

All members were present, as were several representatives of interested groups.

The committee opened with a discussion of Ron Waterman's proposed amendment to HB 265, p. 8, lines 16-17. That amendment would read: "person who is injured or whose property is damaged because of placement or use of a portage" replacing that portion of lines 16-17 following "who" and preceding "portage."

Rep. Mercer moved to approve the amendment, and the motion was carried. Rep. Krueger moved to approve Section 4, and that motion also was carried.

Rep. Mercer expressed his concern with the lack of limits to recreational use in HB 265. He said he felt the bill should provide specific authority for the Fish and Game Commission to limit recreational use, particularly on small streams.

Reps. Krueger and Hammond said that addressing the problem posed by Rep. Mercer would mean starting over in drafting the stream access proposals, and that the committee should focus on working with compromise bill before it.

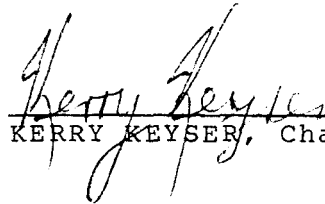
Rep. Mercer suggested that HB 265 be amended to include a cross-reference to the MCA statute addressing the authority of the Fish and Game Commission to regulate recreational use. That statute is §87-1-303 MCA.

At the request of Chairman Keyser, the subcommittee proceeded to a discussion of the provision of HB 265 allowing use of all terrain vehicles (ATV's) as set forth in lines 20-22, page 3. Rep. Keyser said he had problems with allowing the use of ATV's along streams flowing through private property. Rep. Keyser suggested a restriction on the use of ATV's on all streams, not just Class II streams.

Rep. Mercer asked if the subcommittee should consider a complete prohibition of certain recreational uses. Dan Heinz, representing the Montana Wildlife Federation, said his group would be willing to accept some restriction on activities that threaten landowners, but he would be failing to do his job if he didn't mention a concern about restriction of sportsmen's options.

Rep. Hammond asked whether the authority of the Fish and Game Commission granted in §87-1-303 MCA would cover the issue of ATV use.

Rep. Keyser said the concerns of the subcommittee would have to be discussed at a later date and the committee agreed to adjourn until 7:30 a.m. Saturday, January 26.


KERRY KEYSER, Chairman

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

January 26, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order by Chairman Kerry Keyser at 7:30 a.m. Saturday, January 26, in Room 312-3 of the State Capitol.

All members were present, as were several representatives of interested groups.

The committee began with a discussion of HB 265, Section 1, subsection (7), which defines recreational use. Chairman Keyser suggested that the committee discuss whether subsection (7)(a) should be amended to include prohibitions on all-terrain vehicles and activities which are not primarily water-related, such as are included in subsections (7)(b)(iii) and (7)(b)(v).

Rep. Mercer suggested that such prohibitions be added to subsection (7)(a), which covers recreational use on Class I waters.

Rep. Krueger said that he was opposed to moving the (7)(b)(v) provisions against "other activities which are not primarily water-related pleasure activities" to Class I waters. The designation of Class I waters is made because of the ability to support a broad spectrum of activity, and addition the (v) prohibition could limit many uses, he said. Rep. Krueger said he shared the concern over the use of ATV's, but worried that the addition of an "other activities" provision could prohibit activities such as hiking along riverbanks.

Rep. Mercer then suggested that (7)(a) be amended to include, on page 3, line 13, following "waters" the language "except that it does not include, without permission of the landowner: (i) operation of all-terrain vehicles or other motorized vehicles not primarily designed for operation upon the water." That amendment was approved unanimously by the committee.

Rep. Keyser suggested the committee amend page 5, line 13, by striking the words "under lease on [the effective date of this act]." Rep. Krueger moved to pass the amendment, and it was approved unanimously by the committee.

The committee then moved to a discussion of the term "recreational use." Rep. Krueger said he thought it would be a good idea to index to §87-1-303 MCA for a definition of recreational rights.

Ron Waterman agreed, saying the Fish & Game Commission cannot define recreation, it can only regulate use as provided in §87-1-303. The committee agreed to amend Section 2 (page 4, following line 23) to include a referential to 87-1-303. Brenda Desmond agreed to prepare an amendment to present at the next meeting.

Rep. Mercer questioned whether such an amendment would be adequate, saying perhaps a provision should be included that would assign the duty of regulation, not only the authority to regulate to the Fish & Game Commission. Rep. Krueger said the cross-reference to 87-1-303 would allow flexibility to regulate use, and that any further change would drastically alter the bill and require a fiscal note. He said all the foreseeable aspects of HB 265 could not be addressed at this time.

Stan Bradshaw, attorney for the Dept. of Fish, Wildlife and Parks, said the mechanisms are already in place for the department to address recreational use concerns. Those mechanisms, he said, are relatively informal, but allow flexible, problem-specific approaches to address issues.

Rep. Mercer countered that if HB 265 removes the responsibility of stream regulation and protection from the landowner, the state has a duty to take on those tasks, and to have formal mechanisms to address problems. HB 265 should authorize the Fish & Game to place restrictions on stream use, he said.

Mr. Bradshaw told the committee that even in the absence of such formal authorization, the Fish and Game Commission would be very responsive to complaints about stream abuse by either recreationists or landowners.

Rep. Hammond questioned whether a statement of intent could be attached to the bill directing Fish and Game actions, instead of containing such language in the bill. Rep. Mercer asked whether the committee had objections to Section 7 of Rep. Ellison's proposed bill, and wondered whether those specific provisions could be

added to HB 265. Mr. Waterman raised the issue of a possible necessary fiscal note if such provisions were added, and said the committee should avoid making the bill too cumbersome.

Rep. Krueger said that if the bill proves to be unworkable, then the legislature should look at adding specific provisions covering Fish & Game responsibilities. He said the sensitivity of the issue of stream access and the public interest in the issue would guarantee responsible action by the Fish & Game Commission.

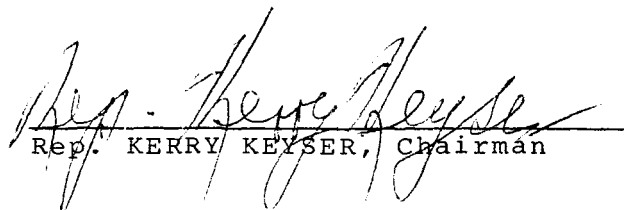
Mary Wright of Trout Unlimited said she opposes the inclusion of language similar to that in Section 7 of Rep. Ellison's bill because the Fish & Game Commission is already carrying out those duties.

Rep. Mercer said he would withdraw his objections to the lack of specific provisions for Fish & Game responsibilities if that department does in fact restrict and regulate activities that harm both large and small streams.

Rep. Krueger suggested that a statement of intent be attached to the bill incorporating provisions for Fish & Game actions before the bill goes back to committee.

The committee agreed to discuss the issue of big game hunting at its next meeting.

There being no time to hear additional issues, the subcommittee adjourned at 8:45 a.m.


Rep. KERRY KEYSER, Chairman

MINUTES OF THE MEETING
JUDICIARY SUBCOMMITTEE
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MONTANA STATE
HOUSE OF REPRESENTATIVES

January 29, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order by Chariman Kerry Keyser at 7:00 a.m., January 29, 1985, in Room 312-3 of the State Capitol.

All members of the subcommittee were present, as were representatives of several interested groups.

Rep. Keyser suggested that the meeting begin with a discussion of how to integrate a reference to 87-1-303 MCA into HB 265. At the last meeting of the subcommittee, researcher Brenda Desmond was asked to prepare an amendment providing a reference to 87-1-303. The amendment she prepared reads:

1. Page 4, following line 23.
Insert: "(3) The commission shall adopt regulations pursuant to 87-1-303 governing recreational use of class I and class II waters including the establishment of a procedure by which any person may request that the type or incidence of such use be limited in the interest of public health, public safety, or protection of property."

Renumber subsequent subsections.

Rep. Mercer asked if the words "any person may request" would mean that the Fish & Game Commission would be required to grant a hearing. He also raised the question of possible over-regulation by the Fish & Game under the authority granted. He said he was "highly suspicious" of the language regarding the requirement of a hearing.

Rep. Krueger said that the legislature does not need to promulgate every possible regulation the Fish & Game commission may need in the future. He said the legislature has the power to correct problems at a later time.

Rep. Mercer said the committee would not be adopting regulations, but rather setting up a framework outlining what sort of limitations and authority would be granted to the Fish & Game.

Rep. Krueger said that no regulations would be adopted by that agency without adequate public hearing and input.

Rep. Mercer said he was concerned about possible problems that would result from not setting out clearly the extent and limits of Fish and Game authority -- for instance, would the commission be allowed to close a stream entirely to protect it from degradation.

Ron Waterman said he believes the language "regulate and limit" set out in 87-1-303 vests with the Fish & Game sufficient authority to address stream problems, including the authority to close a stream if necessary.

Rep. Hammond moved that the proposed amendment to HB 265 be adopted. The amendment was unanimously approved, but with Reps. Keyser and Mercer expressing some reservations about its adequacy.

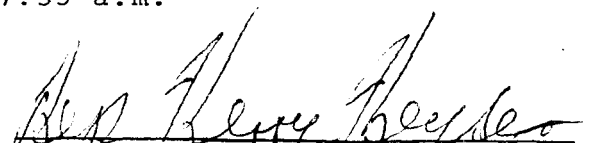
Rep. Mercer said he had problems with the section of HB 265 which defines recreational use. The way in which the bill currently defines recreational use is confusing, he said. He suggested that the term be defined at the beginning of the bill, and that restrictions on that use as defined should be noted later in the bill. He showed the committee a revision he had prepared, and said he would have it printed and distributed to the committee. After reviewing Rep. Mercer's proposed revision, Mr. Waterman said he felt that Rep. Mercer's work helped clarify the intent of HB 265, and stayed within the spirit of the Supreme Court decision.

The subcommittee decided to address the question of prescriptive easements after the entire committee had heard Rep. Orval Ellison's proposed bill (set for hearing in committee 2/1/85).

Rep. Keyser suggested that in its next meeting the subcommittee should discuss the issues of upland and big game hunting, over which he said there is a good deal of concern.

Mr. Waterman suggested that the subcommittee decide on whether to approve the amendment to HB 265 suggested by Rep. Ream. That amendment, on page 2, line 7, would add the words "while flowing through such lands" after "lands". Rep. Krueger moved the amendment be adopted, and the committee unanimously did so.

The meeting was adjourned at 7:55 a.m.


REP. KERRY KEYSER, Chairman

MINUTES OF THE MEETING
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February 4, 1985

The meeting of the Judiciary Subcommittee was called to order at 5:00 p.m. by Chairman Kerry Keyser. All members were present, as were representatives of several interested groups.

Rep. Keyser suggested that the subcommittee begin with a discussion of the definition of surface water, since Rep. Mercer had expressed problems with the lack of a clear definition in HB 265. He suggested a definition of surface water which would cover the actual water in a stream, along with the banks and bed.

Rep. Krueger said he had no conceptual problem with such definition, but would like to hear more discussion of it. Rep. Hammond said he had no problem with such a definition.

Ron Waterman said he thought a definition of surface water would add consistency and clarity to the bill.

Rep. Keyser said that the definition of surface water suggested by Rep. Mercer was appropriate, and reflects the opinion of the Supreme Court.

Researcher Brenda Desmond suggested that a "tightened up" version of the definition of surface water that appeared on page 2, lines 17-19 of the yellow-coded draft should be added to the proposed bill. The definition was to be presented at the next committee meeting for approval.

Rep. Mercer said that in the yellow copy there is no definition of recreational use. Mr. Waterman said such a definition is unnecessary, since the bill spells out specifically what types of recreation cannot take place.

Rep. Keyser agreed, saying the committee should not bring extra confusion to the measure. He asked if the committee could work with the text of the blue-coded bill.

Ron Waterman noted that the underscored portions of the blue working copy were his own additions, and should be considered and rejected or adopted by the committee. The only exception is the underlined portion on page 9, line 17, which was suggested by the Legislative Council.

Rep. Ellison said he wanted the committee to know he had serious problems with the suggested definition of surface water.

Phil Strobe, attorney for the Sweetgrass County Protective Association, agreed with Rep. Ellison. He said it is the view of his organization that the Supreme Court had provided for private ownership of land up to the low water mark, allowing a limited recreational "easement of sorts" for navigation and fishing up to the high water mark. He said that the definition of surface water should designate only the actual water, and only up to the low water mark. On that score, he said, landowners are "in fundamental disagreement" with any other definition of surface water.

Rep. Keyser said that the committee was operating under the assumption that the Supreme Court defined surface water as extending to the high water mark. The committee has defined the high water mark to protect landowners, he said.

Mr. Strobe stated that areas of a streambank between the spring high water mark and the fall low water mark are owned by the abutting property owner, and that the public has no new right in that exposed shoreline. He continued to express disagreement with any definition of surface water that would endeavor to create a public right to use the space between high and low water marks.

Rep. Mercer said he disagreed with Mr. Strobe that the Supreme Court was only talking about "wet stuff" when it entered its stream access decisions. He maintained that the state has the right to decide how land that is sometimes occupied by water is used. The landowner's protection, said Rep. Mercer, is that he has the right to grant permission for uses that go on his land.

Mr. Waterman said that under the Hildreth decision, the meaning of the Court with regard to surface water is clear, and that Rep. Mercer is correct in his interpretation.

Mr. Waterman suggested that the proposed legislation include a definition of "surface water for defining the public's right of use." Such a definition, he said, would not infringe on the question of ownership.

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Rep. Krueger said the committee must be careful not to take away any ownership rights, and that the language suggested by Mr. Waterman meets that responsibility.

Rep. Hammond moved that the committee adopt a definition of "surface water" that would include the phrase: "surface water for the purpose of determining the public's access for recreational use means" That motion was unanimously approved.

Dan Heinz, representing the Montana Wildlife Federation, asked that the committee discuss the issue of big game hunting, specifically page 4, lines 17-24 of the blue-coded copy.

Rep. Mercer said the entire provision regulation big game hunting (lines 17-24) was unnecessary, because restrictions on big game hunting should be uniform on all waters.

Rep. Krueger said that lines 17-24 are necessary, because the distinction between activities that can be supported on Class I and Class II streams is necessary. That distinction, he said, provides protection for Class II streams. A single class definition could not provide adequate protection for all the state's streams.

Rep. Krueger said he could envision instances where Class I streams could support big game hunting.

Mr. Heinz said he recognizes the hazard of hunting on small streams, but stressed his intention to defend sportsmen's rights to hunt on large streams.

Rep. Keyser asked if it was true that big game could safely be hunted on streambanks. He said it seems that hunting on a stream could create a dangerous situation.

Mr. Heinz said that those hazards would apply in many hunting situations and rely on the responsible actions of hunters to avoid dangerous situations. He said float-hunting is a well-established use in many areas. The Montana Wildlife Federation does not want to be unreasonable, and will not push for big game hunting on small streams, he said.

Mr. Waterman said that when the Supreme Court defined recreational use, it did not restrict big game hunting. Page 4, subsection 4 of the blue-coded copy does not

recognize a question of whether big game hunting would be allowed, it assumes such an allowance and addresses the regulation of it.

He suggested language be included that would say "Except as allowed by the commission, big game hunting will not be allowed within the ordinary high water mark." That would address the problem and still not abandon the language of subsection 4, he said.

Mary Wright of Trout Unlimited objected to that approach, which would close significant areas to recreational use until the Fish and Game Commission opens them up again. Such a move would place a big burden, financially and with respect to rule-making, on the commission, she said.

Rep. Mercer said he feels that there is a big difference between hunting on a river and hunting on land. He said population and livestock density is much greater on rivers, and that landowners should be considered. Permission to hunt is a necessity, he said.

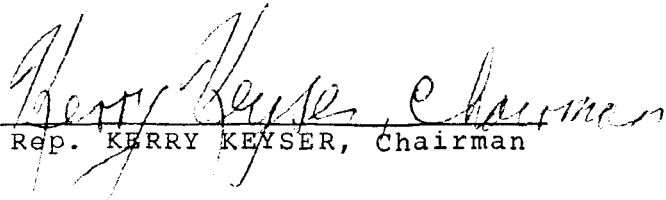
Mr. Waterman said that population density was only a problem along a handful of Class I rivers.

Mr. Heinz restated his position that hunting on rivers is a hard-won right granted to sportsmen by the Supreme Court, and that his group opposes having to ask landowner permission. He said the group would be quite willing to accept Fish and Game restrictions on hunting in these areas.

Rep. Mercer said the Fish and Game would still have a right to close any area, but that the legislature should go a step further and say that whenever big game hunting is going to take place on private land -- even in waters on private land -- the landowner should be able to regulate it. He said the legislature has the right to prohibit recreational uses, and can use private landowner help in doing so.

Rep. Ellison said he wanted to see hunting prohibited where beds and banks are privately owned.

The committee agreed to adjourn and take up the questions of hunting and portage at its next meeting.


Rep. KERRY KEYSER, Chairman

MINUTES OF THE MEETING
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MONTANA STATE
HOUSE OF REPRESENTATIVES

February 5, 1985

The meeting of the Judiciary Subcommittee on stream access bills was called to order by Chairman Kerry Keyser at 5:00 p.m. All members were present, as were representatives of several interested groups. The committee began work with a revised bill, showing amendments and additions made to date, and color-coded as the "teal bill."

Ron Waterman directed the committee's attention to page 4, lines 18-21 of the teal bill, to new language restricting big game hunting along streams.

Dan Heinz, representing the Montana Wildlife Federation, said that he disagreed with the provision. He said it is the MWF's perception that the Supreme Court's Hildreth decision gave sportsmen the right to pursue water-related recreational activity within the high water marks, and that his group would stand firm on that right, subject to big game hunting restrictions set by the Fish and Game.

Rep. Keyser asked whether it was appropriate for the law to give the big game hunter more rights than the landowner. He noted that the law says you must get permission of the landowner to hunt on private land other than streams.

Mr. Heinz said the landowner's rights do not apply between the high and low water marks of a stream. He said his group is only claiming its right to recreation, and will not accept a blanket exclusion of that right.

Mr. Waterman asked if Mr. Heinz recognized an inconsistency in the willingness to accept regulation by the Fish and Game Commission, but not by the legislature.

Rep. Krueger suggested that discussion of this controversial issue be temporarily discontinued, and that the committee move on to a discussion of the portage issue.

The committee turned to page 5, new section 3 of the teal copy to discuss portage.

Rep. Keyser asked if anyone at the meeting had a problem with the section on portage, in an attempt to define the areas of difference.

Dave Donaldson, representing the Montana Association of Conservation Districts, said that he had no fundamental problems with the section, but wondered whether it was appropriate to allow "supervisors" as defined in the bill to interpret "rights."

Mr. Waterman said the definition of "supervisors" includes not only conservation districts, but county commissioners, the soil conservation service and grazing districts, and that both responsibilities and protection from liability are provided for "supervisors."

Stan Bradshaw, attorney for the Fish and Game commission, said that the procedures outlined in the portage section, and the responsibilities to which Mr. Donaldson referred, were "pirated" from the Streambed Preservation Act, which has been effective, and seemed like a logical place to start.

Rep. Mercer suggested that the committee take up the question of "barriers" as defined in Section 3, subsection 2 (p. 6, lines 3-10). He said that if an article does not obstruct, then it cannot be a barrier. He suggested that the word "structure" be inserted in place of the word "barrier" in lines 6-10.

Mr. Waterman agreed that the suggestion made by Rep. Mercer would allow landowners to create obstructions that would still allow for recreational use. The committee agreed to amend Section 3, subsection 2, to delete the word "barrier" in lines 6, 7, and 10, and to replace it with the word "structure," and to delete the words "is designed not to and" from line 7.

Rep. Mercer questioned whether the language of Section 3, subsection (3)(j) would allow for a change "down the line" if an established portage route should for some reason become unusable. Mr. Bradshaw said it was his feeling that the existence of a process as defined in the section would allow for establishment of a new portage route should that become necessary.

Phil Strobe, attorney for the Sweetgrass County Protective Association, said the language in the Supreme Court opinion refers to barriers only in the water, and not to

barriers between the low and high water mark. He said that to disallow or regulate such barriers would be setting the stage for the legislation to be overturned in litigation.

Rep. Keyser said that the portage issue being discussed referred strictly to barriers in the water, and asked where there would be a problem with barriers outside the water.

Mr. Strobe said that if the definition of "surface water" were to include the bed and banks up to the high water mark, then a barrier in that area would create a public right to portage around barriers that were not in the water.

Rep. Mercer suggested that perhaps the definition of barrier should be limited to structures in the water only, "just the wet stuff," and not the surface water.

Mr. Waterman referred to the Hildreth decision, in which the issue was a cable stretched just above the water, which effectively prohibited recreational use of the stream. He suggested that the definition of barrier might be amended to mean a structure which prohibits "recreational use of surface water."

Rep. Krueger said the committee should avoid getting into the high water mark/low water mark issue, and address the question of actual barriers to recreational use.

Mr. Strobe maintained that recreationists are attempting to expand the area allowed for recreational use, and that the Supreme Court decisions support a water-related right only, and not a right to use or travel on banks or beds above the low-water mark.

Mr. Bradshaw said that the Supreme Court has specifically allowed recreational use to the high water line, and the right to portage, and suggested that Mr. Strobe's concern is ill-founded.

Bill Asher, representing the Agricultural Preservation Association, asked to be put on record as supporting the position of landowner groups that recreational use rights should not be expanded.

On general agreement, the committee adopted the definition of "surface water" provided on page 2, lines 17-20 of the teal copy (Section 1, subsection 4).

The committee voted unanimously to adopt the entirety of Section 3, as amended -- page 5, line 22, through page 8, line 10.

Mr. Strobe suggested that the language contained in the proposed legislation is insufficient to carry out the intentions of the bill. He said that the bill would undoubtedly result in litigation, and asked for a consideration of court costs, and language to cover condemnation proceedings. Rep. Keyser said that the objection would be duly noted by the committee.

The committee moved on to consider new language suggested by Mr. Waterman on page 9, lines 13-15. Mr. Waterman said the provision that prevented the acquiring of a prescriptive easement through recreational use is "a gain that works both ways," offering benefits to both recreationists and landowners. He said the provision eliminates the risk of loss of property by landowners, and makes it more likely that recreational uses will be tolerated by landowners. The new language was adopted unanimously by the committee.

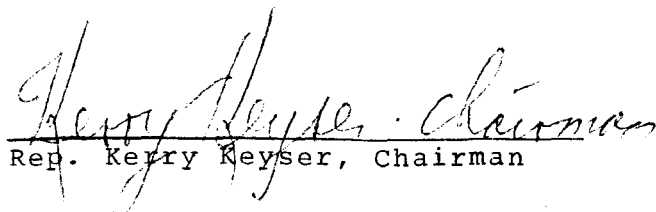
Rep. Krueger suggested that the committee discuss the language of Section 2, subsection 5, covering Fish and Game commission regulation of recreational use. Rep. Mercer said he would like to see a more clear outline of a complaint and hearing procedure.

Mr. Waterman said the language of subsection 5 directs the commission to adopt such a complaint and hearing procedure by directing the commission to adopt regulations and procedures.

Mr. Bradshaw said that the subsection expresses a reasonable desire to hold the commission accountable, and heads in the right direction in doing so. He suggested that perhaps a little re-writing might make the intent of the provision more clear.

Rep. Keyser asked researcher Brenda Desmond to prepare a re-written version of that subsection to be presented at the next committee meeting.

The meeting was adjourned, reserving further issues for later discussion.


Rep. Kerry Keyser, Chairman

MINUTES OF THE MEETING
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ON STREAM ACCESS BILLS
MONTANA STATE
HOUSE OF REPRESENTATIVES

February 6, 1985

The meeting of the Judiciary subcommittee on stream access bills was called to order by Chairman Kerry Keyser at 5:00 p.m. All members were present, as were representatives of several interested groups. The committee continued working from a bill draft referred to as the "teal bill."

Carrying over a previous discussion, the members of the committee decided to add to Section 1 a definition of "commission" as the department of fish, wildlife & parks.

Rep. Krueger suggested that a definition of the term "recreational use" also be added to that section. Mr. Waterman noted that such a definition was left out because later sections specifically defined any recreational uses that would be prohibited through the act.

Rep. Krueger asked that the definition be put back in to Section 1, saying it would not be redundant, and would add necessary language. Rep. Mercer agreed, saying a definition of recreational use is important, and that it gives the assurance that recreational use must have to do with water.

Referring to the original bill, Mr. Waterman suggested removing the Class I and Class II distinctions from the definition of recreational use given on page 3, lines 7-13, and relying on that definition. His suggested definition then read: "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, and other water related pleasure activities and unavoidable or incidental uses."

Mike Josephson admonished the committee to take care with the placement of the term "surface waters," noting that it might be interpreted differently in different contexts.

He also questioned the inclusion of hunting as a recreational use. He noted that ATV's are not included in the definition of recreational use, but are specifically excluded later in the bill. He cautioned against this different standard of approach to limiting recreational uses.

Upon motion by Rep. Hammond, the definition of recreational use noted above was approved.

The committee then turned to a discussion of the issue of big game hunting. Rep. Hammond suggested that perhaps the controversy over big game hunting had been inflated, since the practice of hunting along waters is not new. Rep. Keyser said that since stream access would give hunters new access to private land, the question must be addressed. Rep. Hammond questioned whether permission to hunt would be necessary, since indications are that sportsmen have the right of use on all areas below the high water mark.

Rep. Keyser said that it is not unreasonable to require that hunters ask permission to hunt along streams, since entry on to privately owned adjacent lands is likely. He noted that big game hunting on islands would still be controlled by the department of fish and game, and that no rights would be taken away from hunters through a requirement of permission. Rep. Keyser noted that surrounding states, which have fairly relaxed regulations concerning stream access, all disallow hunting of big game along waterways, except by permission.

Mary Wright of Trout Unlimited said that since the stream corridor would be available for recreational use, hunting should not be treated differently from other recreational activities. She said nothing in the Supreme Court decision called for such a distinction.

Rep. Hammond asked if there has been any negative impact as a result of hunting along streams, and Rep. John Cobb said that some of his constituents living near Vaughn had suffered property damage, and were concerned about safety. Rep. Keyser noted that the interim subcommittee had heard testimony on shots entering yards and hitting barns.

Rep. Hammond said if big game hunting were disallowed except by permission of landowners, hunters would be unable to determine the point in a river-float hunt when they passed from the land where they had permission to property where they did not. Mr. Waterman commented that the problem of knowing where those boundaries lie are common to all hunters, including upland hunters, and that difficulty is the responsibility of the hunter. He added that if streams provide a full recreational corridor, subject to department regulations, that it should also be subject to legislative regulation.

Bill Asher, representing the Agricultural Protective Association, said that hunters have rights as well as responsibilities. He said hunters should be aware of the negative factors involved to stockmen when considering riparian hunting. He noted that fall-calving cows often seek shelter and solitude in riparian areas, and that hunting could result in loss of calves. Mr. Waterman agreed, saying the committee should be aware of a substantial amount of testimony regarding the negative effects of big game hunting along streams.

Jerry Manning, president of the Montana Coalition for Stream Access, stated that only 16 incidents of problems with big game hunting along streams had been reported last year, with a high number of those occurring on Curran or Hildreath property. He stated that the Supreme Court granted hunting rights to sportsmen, and that grant should be recognized by the legislature.

Phil Strobe, representing the Sweetgrass Protective Association, said that statement was "fundamentally in error," and maintained that the court granted navigational use on water only. He added that landowners consider hunting a "significant hazard."

Rep. Mercer said the court had said that private property owners cannot regulate water related use between the high water marks, but did not say that the legislature could not regulate such use. Big game hunting along that corridor is inappropriate, he said, and suggested deleting subsection (4) on page 4, which allowed big game hunting without landowner permission.

Rep. Krueger suggested that the committee consider allowing big game hunting with shotguns or black-powder rifles, which would lessen safety concerns, along stream corridors.

Mary Wright noted that the Fish and Game commission does provide for hunting with those restrictions in some areas. She suggested that perhaps the reasonable distinction should be made not between big game hunting and bird hunting, but be based on ballistics. Rep. Krueger agreed that such an approach might address the safety factor well.

Stan Bradshaw, attorney for the commission, said that it does regulate some areas by limiting hunting to shotguns only, and that safety is the motivation. That regulation, he said, has been "reasonably successful."

Bill Asher stated that safety is an important consideration, but the committee should not lose sight of the trespass problem. He questioned whether hunters can guarantee that big game, once hit, will stay between the high-water marks.

Mary Wright commented that the right to use surface waters clearly does not include the right to trespass, but said that responsible hunters would not take a shot that would not drop an animal without risking trespass.

Rep. Hammond conceded that he was torn between the issue of safety and recreational rights to hunt on a waterway. He suggested the addition of a subsection (d) following line 13, p. 4,

that would read:"(d) big game hunting, except by shotgun or muzzle-loader, as authorized by regulation of the commission." He also suggested that archery hunting be added in that subsection. He said that such a phrase would be about as fine-tuned as could be achieved at the time.

Rep. Krueger said he had no problem with such an amendment.

Rep. Mercer said he opposed the amendment for two reasons; first, the hunter has no guarantee of where an injured animal will go, and second, safety questions remain. Limiting hunting to shotguns has shortened the range, he said, but the hunter still may be shooting toward houses and property.

Rep. Hammond stated that he was not convinced that the sort of instances Rep. Mercer alluded to have actually occurred.

Mike Josephson said he thought the committee was losing sight of the safety issue. "We're not talking about the responsible hunter," he said, noting that regulations must address all hunters.

Rep. Keyser asked that the committee vote on Rep. Mercer's motion to disallow big game hunting except by permission of the adjacent landowner. Reps. Mercer and Keyser voted yes, Reps. Hammond and Krueger voted no. Because of the tie, Rep. Keyser said the bill would go back to committee without a recommendation on the big game hunting issue. At that time, Rep. Hammond said that the subcommittee had heard about all the testimony available on the issue, and stated that he would change his vote, but only for the purpose of getting the bill out of the subcommittee with a recommendation. Rep. Mercer's motion was approved on a 3-1 vote.

Rep. Hammond moved adoption of section 2 as amended, which was unanimously approved.

Mr. Waterman suggested that the committee add an effective date to page 2, line 11. Rep. Mercer countered by saying he had a big problem with the provision defining commercial activity, saying it was "too broad"

Rep. Keyser questioned whether the underlined language on that line was necessary at all to define commercial activity.

Mary Wright said the language was probably not necessary, but provides a clarification. Mr. Waterman agreed, saying the language was in response to a discussion with Rep. Ellison, and provided an additional context for "commercial activity."

Rep. Mercer suggested that the committee could simplify the distinction further by dropping the commercial activity distinction altogether, because "the consequences aren't that big." Mary Wright countered that the consequences of the definition do have meaning, and are of great importance to some parties.

Rep. Mercer asked if there is a waterway in the state that could satisfy (d) or (e), but not (a)(b) or (c). Ms. Wright said, yes, some small rivers or large streams could fall into that category.

Rep. Mercer then asked what was ^{the} use of having Class I and Class II waters if it was impossible to tell the difference. "If there's no clear line, there's no sense to the bill," he said.

Mrs. Wright stated that sportsmen have no desire to see every river in the state designated as Class I. "We don't think it's going to give us unrestricted access, and we don't want it," she said of the bill. The categories do have a meaning, she continued. She cited the Ruby River, which would be a Class I stream, but noted that the creeks feeding it would be Class II.

Rep. Cobb commented that the state should have a floatability test, but worried that it would add small creeks, if tested during high water.

Stan Bradshaw stated that he had spent ten years researching the navigability question, and felt that the test already described in the bill offers a narrower description than a floatability test.

Rep. Mercer said that the definitions of Class I and Class II waters in the bill are "horribly unfair to the public."

Rep. Keyser asked how it could clear up the definition if (d) and (e) were removed, and Rep. Mercer said that a stream might not fall under (a)(b) or (c), but could fall under (d) or (e). He said that (d) or (e) "could be anything." Rep. Mercer then moved to have subsections (d) and (e) (page 2, lines 10-14, teal copy) stricken, and asked for a new subsection (b) that would read "(b) satisfy the federal test of navigability for the purposes of state ownership;".

Rep. Keyser said that would likely make all but three rivers in the state Class II.

Rep. Krueger said the state would be forced into litigation under the proposed (b) amendment. He said looking at commercial activity allows reliance on case law.

Rep. Krueger said he would be willing to "back off" if someone offered a judicial definition of commercial activity.

Mary Wright suggested that the existing (d) be amended to add "judicially defined as of the effective date of this act." Mr. Waterman said he had read nearly all the available definitions of commercial activity, and they rarely mentioned a "purely fishing or hunting guide."

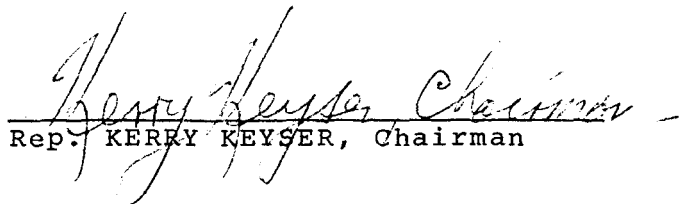
Rep. Keyser offered a substitute motion, to add the language "as of the date of this act" following "judicially defined" on page 2, line 11. Reps. Keyser, Hammond and Krueger voted yes, Rep. Mercer voted no.

Rep. Hammond moved that the committee adopt the amended definition of Class I waters, and that motion was approved, with Rep. Mercer voting no.

Rep. Krueger moved the acceptance of the definition of Class II waters, with the addition of a definition of recreational use, previously agreed upon. That motion was unanimously approved.

Rep. Keyser moved that the committee adopt the bill in its present form, holding the right to formally adopt the gray copy.

There being no further business before the committee the meeting was adjourned.


Rep. KERRY KEYSER, Chairman