

HOUSE BILL NO. 16

1/07 Introduced
1/07 Referred to Judiciary
1/22 Hearing
Died in Committee

1 HOUSE BILL NO. 16
 2 INTRODUCED BY MARKS
 3 BY REQUEST OF INTERIM SUBCOMMITTEE NO. 2

4
 5 A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY DEFINE
 6 LAWS GOVERNING RECREATIONAL USE OF STATE WATERS; PROHIBITING
 7 RECREATIONAL USE OF DIVERTED WATERS; PROHIBITING, WITH
 8 CERTAIN EXCEPTIONS, USE OF PRIVATE LAND BENEATH WATERS;
 9 RESTRICTING THE LIABILITY OF LANDOWNERS WHEN WATER IS BEING
 10 USED FOR RECREATION OR LAND IS BEING USED AS AN INCIDENT OF
 11 WATER RECREATION; PROVIDING THAT A PRESCRIPTIVE EASEMENT
 12 CANNOT BE ACQUIRED BY RECREATIONAL USE; AMENDING SECTION
 13 70-19-405, MCA; REPEALING SECTION 87-2-305, MCA; AND
 14 PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

17 NEW SECTION. Section 1. Definitions. For purposes of
 18 [sections 3 and 4], the following definitions apply:

19 (1) "Barrier" includes a natural or artificial
 20 obstruction located in or over a water body, restricting
 21 passage on or through the water. A barrier may include but
 22 is not limited to bridges, fences, fallen trees, rocks,
 23 shoals, or rapids.

24 (2) "Ordinary high-water mark" means the line that
 25 water impresses on land by covering it for sufficient

1 periods to cause physical characteristics that distinguish
 2 the area below the line from the area above it.
 3 Characteristics of the area below the line include, when
 4 appropriate, but are not limited to lack of terrestrial
 5 vegetation or lack of agricultural crop value.

6 NEW SECTION. Section 2. Recreational use of waters
 7 permitted -- exception. (1) Except as provided in subsection
 8 (2), any surface waters that are capable of recreational use
 9 may be so used by the public without regard to ownership of
 10 the land underlying the waters.

11 (2) The public may not make recreational use of
 12 surface waters while they are diverted away from a natural
 13 water body for beneficial use pursuant to Title 85, chapter
 14 2, part 2 or 3.

15 NEW SECTION. Section 3. Use of land between ordinary
 16 high-water marks -- when permissible -- when prohibited. (1)
 17 A member of the public may make recreational use of the land
 18 between the ordinary high-water marks of surface waters that
 19 satisfy the federal test of navigability for purposes of
 20 state ownership.

21 (2) A member of the public may not make recreational
 22 use of the land between the ordinary high-water marks of
 23 surface waters that do not satisfy the federal test of
 24 navigability for purposes of state ownership, except when:

25 (a) such use is unavoidable and incidental to use of



1 the waters permitted under [section 2]; or

2 (b) the owner of such land or his authorized agent
3 grants permission to use the land.

4 (3) Use of the land is unavoidable and incidental to
5 use of the waters permitted under [section 2] only when the
6 use is temporarily necessary for purposes of safety, health,
7 or bypassing barriers.

8 NEW SECTION. Section 4. Portaging -- when
9 permissible. When making recreational use of waters, a
10 member of the public may portage, above the ordinary
11 high-water mark, around barriers in the least intrusive
12 manner possible, avoiding damage to the landowner's land and
13 violation of his rights.

14 NEW SECTION. Section 5. Restriction on landowner
15 liability during recreational use of waters or land. (1) No
16 person who makes recreational use of surface waters flowing
17 over or through any land in the possession or under the
18 control of another, pursuant to [section 2], or land,
19 pursuant to [section 3 or 4], has the status of invitee or
20 licensee.

21 (2) A landowner or tenant is liable to a person making
22 recreational use of waters or land described in subsection
23 (1) only for an act or omission that constitutes willful or
24 wanton misconduct.

25 (3) This section does not apply to a landowner or

1 tenant who for compensation permits the land described in
2 subsection (1) to be used for recreational purposes.

3 NEW SECTION. Section 6. Prescriptive easement not
4 acquired by recreational use. (1) A prescriptive easement is
5 a right to use the property of another that is acquired by
6 open, exclusive, notorious, hostile, adverse, continuous,
7 and uninterrupted use for a period of 5 years.

8 (2) A prescriptive easement cannot be acquired through
9 use of land or water for recreational purposes.

10 Section 7. Section 70-19-405, MCA, is amended to read:

11 "70-19-405. Title by prescription. Occupancy Except as
12 provided in [section 6], occupancy for the period prescribed
13 by this chapter as sufficient to bar an action for the
14 recovery of the property confers a title thereto,
15 denominated a title by prescription, which is sufficient
16 against all."

17 NEW SECTION. Section 8. Repealer. Section 87-2-305,
18 MCA, is repealed.

19 NEW SECTION. Section 9. Codification instruction.
20 Section 5 is intended to be codified as an integral part of
21 Title 70, chapter 16, part 3, and the provisions of Title
22 70, chapter 16, part 3, apply to section 5.

23 NEW SECTION. Section 10. Severability. If a part of
24 this act is invalid, all valid parts that are severable from
25 the invalid part remain in effect. If a part of this act is

1 invalid in one or more of its applications, the part remains
2 in effect in all valid applications that are severable from
3 the invalid applications.

4 NEW SECTION. Section 11. Applicability. Sections 6
5 and 7 apply only to a prescriptive easement that has not
6 been perfected prior to the effective date of this act.

7 NEW SECTION. Section 12. Effective date. This act is
8 effective on passage and approval.

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